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MASSACHUSETTS REPORTS

236

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1920 — JANUARY 1921

ETHELBERT V. GRABILL

REPORTER

BOSTON
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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. HENRY KING BRALEY.
HON. CHARLES AMBROSE DE COURCY.
HON. JOHN CRAWFORD CROSBY.
HON. EDWARD PETER PIERCE.
HON. JAMES BERNARD CARROLL.
HON. CHARLES FRANCIS JENNEY.

ATTORNEY GENERAL

HON. JOHN WESTON ALLEN.

In pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

RAGNA M. NIELSON, petitioner.

Middlesex. March 29, 1920. — May 19, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL & JENNEY, JJ.

Practice, Civil, Exceptions. *Broker,* Commission. *Agency,* Existence of relation, Scope of authority, Agent's compensation. *Contract,* Implied.

In a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate, the defendant alleged exceptions to refusals to grant rulings that upon all the evidence at the trial the plaintiff could not recover. Upon the evidence recited in the bill, it appeared that all of the plaintiff's negotiations were with the defendant's husband and that findings would not have been warranted that the defendant authorized them or had any knowledge that the plaintiff had been employed as a broker or that he had procured and introduced to her husband as a customer one to whom she finally sold the real estate, or that the plaintiff was the effective cause of bringing about the sale. The trial judge disallowed the bill as not conformable to the truth, and the defendant filed a petition for the establishment of her exceptions. A commissioner reported additional evidence that was introduced at the trial, upon which findings would have been warranted that the plaintiff was the efficient cause in inducing the purchase at the defendant's price, that the defendant's husband had told her of the employment of the plaintiff as a broker and that, knowing of the acts of her husband in her behalf and keeping silent, she had ratified and adopted his contract with the plaintiff. *Held,* that the proposed bill of exceptions was not conformable to the truth, and that the petition must be dismissed.

PETITION, filed in the Supreme Judicial Court on December 30, 1919, for the establishment of exceptions alleged to have been saved by the petitioner at the trial in the Superior Court before *Chase*, J., of an action of contract brought against her by one George I. Holland, the judge having disallowed the exceptions as not conformable to the truth.

A commissioner was appointed. Material facts found by him are described in the opinion.

The case was submitted on briefs.

J. Cummings, for the petitioner.

E. A. Counihan, Jr., for Holland.

PIERCE, J. This is a petition to prove a bill of exceptions which was disallowed on December 16, 1919, as not conformable to the truth. The commissioner found that the bill of exceptions was duly filed on December 5, 1919; that a notice in writing thereof was given the plaintiff on the same day that all the requests for rulings were refused; that the petitioner seasonably saved exceptions to the refusal or failure to give the rulings prayed for; that an exception was duly saved to the passage in the charge which reads: "Not only the relation which existed between herself and her husband which of itself would not be sufficient to constitute an agent but which may be considered in connection with other things in that respect;" and that she did not except "to that portion of the charge as a whole so far as it was inconsistent with and did not fully cover her said seven requests for rulings."

The commissioner also found that the bill was disallowed without an opportunity to amend; that in the main the evidence is stated accurately and fairly; that the counsel was unable to obtain the stenographic transcript of the evidence until about the time of the hearing before the commissioner; that the counsel had to rely entirely upon his memory and his own notes; that some portions of the evidence were apparently inadvertently omitted and that the parties disagree as to materiality of the omitted evidence.

The action was one of contract express or implied, brought by a real estate broker to recover a commission on the sale of real estate owned by the petitioner. The husband of the petitioner owned and operated a grocery on the premises of his wife,

and was sued by the plaintiff for the same commission which is the subject of the action against the wife and, in addition, in a second count, for a commission on the sale of the grocery. The jury found for the plaintiff in each action, but a bill of exceptions was filed in behalf of the petitioner only in the case against the wife. We assume the verdict against the husband was upon the second count only. *Gavin* v. *Durden Coleman Lumber Co.* 229 Mass. 576.

The evidence set out in the tendered bill of exceptions discloses that the husband of the petitioner and the owner and occupant of the store in the building on the land of the petitioner entered into negotiations with the plaintiff, as a broker in real estate, in regard to the sale of the real estate and the store; that the husband "wanted $7,000 for the building and $2,000 for the store;" that the plaintiff went to considerable trouble and expense to obtain a customer; that he received two offers of $8,500 for both real estate and the store; that the offers were instantly refused; that he advertised the matter in the Boston Globe without result; that he entered into an arrangement with one Owen, a real estate broker; that Owen sent to the plaintiff one Charles Avakian; that the plaintiff introduced Avakian to the husband who showed them through the building and store; that Avakian made an offer of $8,500 for both real estate and the store; that the offer was at once refused, the husband saying that he thought he did not want to sell for that price and would see his wife about it; that the husband never made any report to them; that nothing further was said or done to procure a purchaser on the terms above stated by the broker; that the negotiations were resumed by Avakian after several weeks or months, solely with the husband, who accepted $9,000 for both the real estate and the store, — the price originally asked; that a bill of sale of the store by the husband and a deed of the real estate by the wife were delivered to Avakian on June 23, 1916.

It further appeared that the wife lived at a distance from the store; that she was the owner of the real estate; that her husband never acted as her agent in the management of her affairs; that she always managed the real estate herself, and collected the rents; that when she was unable to do so she entrusted the management of it to her daughters; that she had never had any communication

with the plaintiff or with Owen, who both were strangers to her; that she had never authorized her husband to employ a broker to sell her real estate, and did not know that a broker claimed to have acted in the premises until after the writ was served upon her in the action.

At the close of the evidence the defendant in the original action asked the trial judge to rule "That upon all the evidence the plaintiff is not entitled to recover against the defendant, Ragna M. Nielson." The judge refused so to rule and submitted the case to the jury, who found for the plaintiff, and the defendant duly excepted.

The plaintiff would not have been able to recover on the facts set out in the proffered bill of exceptions. He was authorized to procure a purchaser able, willing and ready to buy the grocery for $2,000 and the real estate for $7,000. He found two persons who were willing to pay $8,500 for both the real estate and the grocery. The husband refused to accept either offer, the plaintiff remained inactive for weeks; the petitioner then sold her premises for $7,000, and her husband sold his grocery for $2,000 to one Avakian, who had offered to pay $8,500 for both store and premises. No facts are alleged to warrant an inference of bad faith, or to contradict the testimony of the petitioner that she had not authorized the employment of a broker to sell her property and had no knowledge that either Owen or the plaintiff had procured Avakian as a customer for the land and store. *Bruce* v. *Meserve*, 228 Mass. 463. *Bowes* v. *Henry*, 228 Mass. 341.

The commissioner found in addition to the facts appearing in the bill of exceptions that Avakian made an offer through Owen to the plaintiff of $9,000 for the store and land; that that offer was communicated to the husband, and by him to the petitioner. In addition, he also reported as material to the issues the direct and cross-examination of the petitioner. In the cross-examination in substance the petitioner testified that she first knew she was going to sell the real estate in June; that her husband told her so; that she told him the price she wanted for it; that he told her there was a man going to pay the price she wanted; that he told her who the man was; and that that man was Avakian. It is plain these additional facts were material, and if believed would authorize a finding that the plaintiff was the efficient cause in

inducing Avakian to buy the property at the petitioner's price. It would also warrant a finding that the husband of the petitioner had told her of the employment of the plaintiff to sell her real estate at her price, and that, knowing her husband's acts on her behalf, keeping silent, she ratified or adopted his contract with the plaintiff.

The commissioner's report further discloses that the exception taken to the charge is not fully understandable, separated from the immediately preceding parts of the charge, which are omitted in the proposed bill of exceptions. What has been said covers all the other requests for rulings.

It follows that the exceptions were not conformable to the truth within the meaning of the statute, and that the petition must be dismissed.

Petition dismissed.

ELLEN L. DUFFEY *vs.* SCHOOL COMMITTEE OF HOPKINTON.

Suffolk. March 30, 1920. — May 19, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & JENNEY, JJ.

School and School Committee, Superintendency union. *Words*, "Vacation periods."

The Thanksgiving recess, including the last Thursday of the month of November and the Friday immediately following, was *said* not to be a "vacation" period within the meaning of St. 1914, c. 714, § 2, requiring, before dismissal of a teacher in the public schools, that the teacher shall be given notice by the school committee of its intention "at least thirty days prior to the meeting, exclusive of the customary vacation periods."

Teachers in public schools in towns which compose a superintendency union are protected by the provision of St. 1914, c. 714, § 2, that no teacher within the protection of the statute shall be dismissed "unless . . . the superintendent of schools shall have given to the school committee his recommendations as to the proposed dismissal."

PETITION, filed in the Supreme Judicial Court for the county of Suffolk on December 15, 1919, for a writ of mandamus directing the school committee of the town of Hopkinton to reinstate the petitioner as a teacher in the public schools, from which position she alleged that she had been illegally removed.

The petition was heard by *Carroll*, J. Material facts found by him are described in the opinion. He "ruled that thirty days' notice was given to the petitioner before action was taken by the committee dismissing her." He found that no "recommendation for the petitioner's removal was made by the superintendent of schools," but ruled that no such recommendation was necessary in order to give the school committee power to act, because there was a superintendency union under St. 1914, c. 714, § 7, between the towns of Hopkinton and Ashland; and reported the case to the full court for determination.

St. 1914, c. 714, is as follows:

"Section 1. The school committee of a city or town, in electing a teacher or superintendent who has served in the public schools of its city or town for the three previous consecutive years, shall employ such teacher or superintendent to serve at the discretion of the school committee, subject to the provisions of section two of this act.

"Section 2. The school committee may dismiss any teacher or superintendent from employment by a two thirds vote of the whole committee, and such teacher or superintendent shall not receive any compensation for service rendered after such dismissal: provided, that a teacher or superintendent employed to serve at the discretion of the school committee, as provided in section one of this act, shall not be dismissed unless, at least thirty days prior to the meeting, exclusive of customary vacation periods, at which the committee votes upon the question of his dismissal, he shall have been given notice of the intention of the school committee to vote upon the question of his dismissal, nor unless he shall have been given, upon his request, a statement by the school committee of the reasons for which his dismissal is proposed; nor unless, also, in the case of a teacher, the superintendent of schools shall have given to the school committee his recommendations as to the proposed dismissal.

"Section 3. (1) No teacher employed to serve at the discretion of the school committee, as provided in section one of this act, shall suffer a decrease of salary without his consent, except by a general salary revision affecting equally all teachers of the same salary grade in the city or town. (2) A superintendent employed to serve at the discretion of the school committee shall suffer no

decrease in salary without his consent, until at least one year after the school committee has voted to reduce his salary.

"Section 4. Nothing herein contained shall be construed as limiting the right of a school committee to suspend a teacher or superintendent for immoral conduct or other conduct unbecoming a teacher; and if the teacher or superintendent so suspended is subsequently dismissed because of such conduct, he shall not receive any salary for the period of his suspension.

"Section 5. Nothing herein contained shall be construed as limiting the right of a school committee to dismiss a teacher when an actual decrease in the number of pupils in the schools of the city or town renders such action advisable.

"Section 6. All acts and parts of acts inconsistent herewith are hereby repealed.

"Section 7. This act shall not apply to superintendents of superintendency unions.

"Section 8. This act shall not apply to the city of Boston.

"Section 9. This act shall take effect on the first day of July in the year nineteen hundred and fourteen."

The case was submitted on briefs.

C. W. Rowley & D. J. Riley, for the petitioner.

J. E. Swift, for the respondents.

RUGG, C. J. This is a petition for a writ of mandamus brought to secure reinstatement as teacher in the public schools of Hopkinton, a position from which the petitioner alleges that she has been removed wrongfully.

The salient facts are that the petitioner had been a teacher in the high school in Hopkinton since September, 1913, until December, 1919, when she was dismissed by a two thirds vote of the school committee. She was notified in writing by letter, dated November 1, 1919, of the intention of the school committee to vote on the question of her dismissal at a meeting to be held on December 6, 1919.

This notice was given "at least thirty days prior to the meeting, exclusive of the customary vacation periods" as required by St. 1914, c. 714, § 2. The customary vacations in Hopkinton as shown by the town reports and by other evidence were at Christmas, Easter and during the summer. The Thanksgiving recess, including Thursday and Friday of Thanksgiving week,

was not a "vacation" period within the meaning of those words in the statute.

The petitioner was informed, in response to her request, that the reasons for which her dismissal was proposed were "conduct unbecoming a teacher and insubordination." That was a sufficient compliance with the terms of § 2, at least in the absence of demand for more detailed specifications.

The chief question presented is, whether St. 1914, c. 714, is applicable to a town (like Hopkinton) which has joined with another town or towns to form a superintendency union or district. R. L. c. 42, §§ 41, 43, as amended by St. 1912, c. 114, and § 44 as amended by St. 1911, c. 384. The title of said St. 1914, c. 714, is "An Act relative to the tenure of office of teachers and superintendents of public schools." It is provided by § 2 that no teacher within its protection shall be dismissed "unless . . . the superintendent of schools shall have given to the school committee his recommendations as to the proposed dismissal." This provision is broad in its language. It apparently includes all teachers within the Commonwealth, because by R. L. c. 42, § 40, all cities and towns must either employ a superintendent of schools or be within a union or district employing a superintendent of schools. The words of § 7 of that act (see St. 1918, c. 257, § 182, as amended by St. 1919, c. 5) namely, "This act shall not apply to superintendents of superintendency unions," do not exempt teachers within the towns composing such unions or districts. As matter of statutory construction that section and those words mean that the tenure of office, to which the act is devoted, does not apply to such superintendents. They do not imply that the "recommendations as to the proposed dismissal" required by § 2 shall be inoperative as to superintendents of superintendency unions and shall afford no protection to teachers working in schools supervised by such superintendents. The teachers who are subject to the act by § 1 include all teachers. Doubtless the reason why superintendents of superintendency unions are excluded from the operation of that statute is that ample provision is made touching their tenure of office by St. 1911, c. 384.

The history of the legislation confirms the view that the recommendation of the superintendent as to the proposed dismissal is a prerequisite to the dismissal. Absolute power to dismiss

teachers was plainly given to the school committee by R. L. c. 42, § 31. By the following section it was optional with the school committee to elect a teacher to serve at its pleasure instead of electing each year. The radical change wrought by said St. 1914, c. 714, provided a tenure of office for teachers as well as for superintendents except superintendents of school unions already protected in their tenure by St. 1911, c. 384, and protected teachers who have served for the three previous consecutive years from removal (except for causes specified in § 4) unless and until certain essential preliminaries have been observed.

The reason of the act tends in the same direction. It seems just as important to safeguard the tenure of service of teachers in small communities where schools are under a superintendent of a superintendency union as it is in more populous cities and towns. The advice of the superintendent, who may be presumed to possess more than ordinary skill and judgment touching the general competency and usefulness of teachers, may be quite as necessary in order to prevent injustice and to insure the highest possible efficiency of the public schools in the small town as in larger centres.

No recommendation by the superintendent of schools was made as to the proposed dismissal of the petitioner: hence the school committee acted beyond their power in attempting to discharge the petitioner from the service.

The report is treated as presenting only questions of law, since these alone can be decided by the full court. *Boucher* v. *Salem Rebuilding Commission*, 225 Mass. 18. The petition seems to have been denied as matter of law and not in the exercise of discretion, and therefore the petitioner appears to be entitled to prevail.

Writ to issue.

CORDELIA LABRECQUE, administratrix, *vs.* WALLACE B. DONHAM, receiver.

Middlesex. March 5, 1920. — May 20, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, In use of motor vehicle, Street railway. *Evidence*, Relevancy and materiality, Competency. *Motor Vehicle*, Registration. *Witness*, Contradiction. *Practice, Civil*, Requests and instructions, Judge's charge.

At the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car, the defendant offered to show by a police officer that a fellow employee of the plaintiff's intestate stated to the witness that at the time of the accident they were "swapping wheels and stalled, run on to the track and stalled the engine." The fellow employee, in testifying for the plaintiff, had stated that he did not remember what he had said to the officer as to how the accident happened. The evidence was excluded. *Held*, that the evidence rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee.

At the trial of the action above described, the employer of the plaintiff's intestate, who was driving the truck, and the fellow employee testified for the plaintiff, and, among other things, stated that they were sober at the time of the accident; and the defendant offered evidence tending to show that previous to the accident these witnesses had stopped the truck and passed a flask between them which could have been found to contain intoxicating liquor, and also other evidence tending to show that the witnesses were intoxicated when the accident happened. The evidence was excluded. *Held*, that the evidence should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony.

At the trial of the action above described, the defendant offered to show by the motorman of a street car which had been running behind the motor truck that the employer and the fellow employee of the plaintiff's intestate, who were sitting on the seat of the truck while he sat at the side on a tool box, and who had testified for the plaintiff and had stated that they were sober at the time of the accident, "were boisterous, noisy, that they drove their auto in front of the car and held it back several times, so that because of it the car lost twelve minutes in going from Medford to Woburn; that at times when the auto left the track to let the car go by one of the men, the plaintiff's intestate — well, that is a matter of inference, but one of the men thumbed his nose at the motorman and Ha! Ha! 'd to him." The evidence was excluded. *Held*, that the evidence should have been admitted because it tended to prove that the witnesses for the plaintiff were intoxicated at the time of the accident and thus tended to controvert and to discredit their testimony.

At the trial of the action above described, there was evidence tending to show that, within three hours previous to the accident, the plaintiff's intestate had been drinking intoxicating liquor, and the defendant asked that the jury be instructed that, if the plaintiff's intestate was intoxicated at the time of the accident and such intoxication contributed to the injury, he could not recover. The judge refused so to instruct the jury, but did leave to them the question whether the intestate's conduct was the conduct of "an ordinarily prudent man under the circumstances." The jury found for the plaintiff. The defendant alleged exceptions. *Held*, that

(1) The instruction asked for should have been given;

(2) The instruction given was open to the interpretation that the circumstances in which the care of the intestate was to be judged included that of voluntary intoxication and therefore that subject was inadequately dealt with in the charge;

(3) This court could not say that this error of the trial judge did not result in harm to the defendant, and therefore the exceptions should be sustained.

At the trial of the action above described, the judge in his charge to the jury at times correctly instructed them that the motorman of the street car that ran into the plaintiff's intestate was bound to exercise the care of a reasonably prudent man under the circumstances, but, at other times, he told them in substance that the motorman was required to exercise the care of a reasonably prudent man "with his skill," that he was bound to act with the care of "a reasonably careful and skilful man;" that he was to be judged by the standard of care that would be reasonably expected from "a prudent man, skilful man, with his experience just as he stood there on the car." The defendant excepted. *Held*, that prejudicial error was committed, and that the exceptions must be sustained.

At the trial of the action above described, there was evidence tending to show that the motor truck, although properly registered, was being operated contrary to law with a temporary number plate, used without authority. It did not appear that the intestate knew of the improper use of the number plate. *Held*, that the act of the plaintiff's intestate in attempting to crank the truck was not operating it nor participating in its operation, and that the plaintiff therefore was not precluded from recovering by reason of the use of improper number plates.

TORT, with a declaration in two counts, the first count for causing the death, and the second for causing conscious suffering of the plaintiff's intestate, Henry Labrecque, resulting from a collision between a motor truck, on which he was riding as an employee, and a street car of the Bay State Street Railway Company, then being operated by the defendant. Writ dated November 26, 1918.

In the Superior Court, the action was tried before *Raymond*, J. There was evidence that the plaintiff's intestate had been drinking intoxicating liquors within three hours before the accident. Other material evidence and exceptions saved by the defendant to rulings as to the admission and exclusion of evidence are described in the opinion.

At the close of the evidence, the defendant moved that a verdict be ordered in his favor. The motion was denied. The defendant then asked that the following instructions be given to the jury:

"8. If the jury find that the plaintiff's intestate was intoxicated and that his intoxicated condition contributed to the accident, the plaintiff cannot recover.

"9. If the jury find that the plaintiff's intestate was intoxicated that will not excuse him from exercising the care that a reasonably prudent and sober man would exercise under the circumstances.

"10. If the jury find that the plaintiff's intestate was operating the truck at the time of the accident, the plaintiff cannot recover.

"11. If the jury find that the plaintiff's intestate was taking any part in the operation of the truck the plaintiff cannot recover."

The requests were refused. There was a verdict for the plaintiff in the sum of $5,130 upon the first count of the declaration, and $2,052 upon the second count; and the defendant alleged exceptions.

J. M. O'Donoghue, for the defendant.

T. W. Proctor, for the plaintiff.

CROSBY, J. This is an action to recover for the conscious suffering and death of Henry Labrecque, who died as the result of injuries received on October 24, 1918. He was employed by one Seymour who operated an automobile truck between Boston and Lowell.

In the morning of the day of the accident, Seymour drove the truck from Lowell to Boston, having with him as helpers the plaintiff's intestate and one Swan; and on the return trip in the afternoon of the same day, an electric car of the Bay State Street Railway Company (at that time operated by the defendant as receiver) collided with the truck on a State highway in the town of Tewksbury and the plaintiff's intestate received the injuries which resulted in his death. Swan testified that they left Boston about one o'clock and that just before leaving he and Labrecque each had two drinks of whiskey; Seymour testified that Swan and Labrecque had been drinking that day. On the way back Seymour and Swan rode on the seat and Labrecque sat on a tool box on the right hand running board. The travelled part of the highway at the point in question was macadamized, and to the left of it in travelling toward Lowell was the street railway track; just before the accident

the truck, operated by Seymour, was being run on the macadam roadbed, and when it reached the bottom of the hill he "heard a rumbling sound on his truck and turned his head to the left to see what it was. The truck turned to the left off the roadbed into the sand and the left front wheel went over the nearest rail of the street car track, and the engine of the auto truck stopped. Seymour looked up and saw that a street car was approaching from Lowell and the plaintiff's intestate who was riding on a tool box on the right hand running board of the auto, stepped to the ground and went in front of the truck with his back to the car to crank the engine of the auto for the purpose of starting it. While doing this, the street car which was coming down hill in the opposite direction hit him, causing the injuries from which he died."

The question whether the motorman of the electric car was negligent was properly submitted to the jury, and we do not understand the defendant to contend to the contrary. The conduct of the plaintiff's intestate also was for the jury.

1. The defendant offered to show by a police officer that the latter was told by Swan (who testified for the plaintiff) that at the time of the accident they were "swapping wheels and stalled, run on to the track and stalled the engine;" this evidence was excluded and the defendant excepted. The record does not disclose that the evidence contained in the offer of proof had any tendency to contradict anything testified to by Swan; he testified that he did not remember what he said to the officer as to how the accident happened. This exception must be overruled.

2. The defendant offered to show that on the return trip the men on the seat of the truck stopped the engine and passed a flask between them which could have been found to contain intoxicating liquor. This evidence, with other evidence, was admissible as having a tendency to show that Seymour and Swan were intoxicated when the accident happened. If the jury so found, it could also have been found that it affected the credibility and weight to be given to their testimony. The exception to the exclusion of the evidence must be sustained.

3. One Redfern, a motorman, testified that on the day of the accident, and before it occurred, he was operating his car in the same direction as the truck was travelling and caught up with it just before he reached the Winchester line. The defendant offered

to show by this witness, for the purpose of proving that the men on the truck were under the influence of liquor that they "were boisterous, noisy, that they drove their auto in front of the car and held it back several times, so that because of it the car lost twelve minutes in going from Medford to Woburn; that at times when the auto left the track to let the car go by one of the men, the plaintiff's intestate — well, that is a matter of inference but one of the men thumbed his nose at the motorman and Ha! Ha!'d to him." This evidence was excluded. It should have been admitted as it was competent to show that Seymour and Swan were under the influence of liquor and to contradict their testimony that they were sober at the time of the accident.

As we find no error in the exclusion of evidence to which the other exceptions were taken, they need not be considered in detail.

The remaining exceptions relate to the refusal of the trial judge to give certain instructions to the jury, and to a part of the charge.

4. The defendant's eighth and ninth requests in substance should have been given. If the plaintiff's intestate was intoxicated at the time of the accident, this alone does not prevent her maintaining this action and the jury were so instructed; but if his intoxication contributed to the injury in any degree, she cannot recover, *Holland* v. *West End Street Railway*, 155 Mass. 387, 388, *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448, 450, and this is true notwithstanding St. 1914, c. 553. These requests directed the attention of the judge to an important and pertinent principle of law with reference to which the defendant was entitled to have the jury instructed; and although the judge referred to the evidence respecting intoxication, he did not give the instructions requested either in form or substance. He stated to the jury "Was his [Labrecque's] conduct the conduct of an ordinarily prudent man under the circumstances?" The instruction given is open to the interpretation that the circumstances under which the care of the plaintiff's intestate was to be judged included that of voluntary intoxication. We think that the subject matter of these requests was inadequately dealt with; that the jury should have been told in substance that if the plaintiff's intestate was intoxicated and that such condition contributed to the accident, there could be no recovery; and that if he was in-

toxicated he was not excused from exercising the care that a reasonably prudent and sober man would exercise under the circumstances. We cannot say that the failure to instruct the jury in substance as requested did not result in harm to the defendant; accordingly these exceptions must be sustained. *Bride* v. *Clark*, 161 Mass. 130. *Bergeron* v. *Forest*, 233 Mass. 392, 402.

5. After the judge had finished his charge, a conference between him and counsel took place at the bench, at the conclusion of which he read to the jury four instructions asked for by the defendant: the first, an instruction in effect that the conduct of the motorman was to be judged by the standard of care that would be reasonably expected from a prudent man acting in a like emergency. This was correct. The second was in substance to the same effect as the first, but to it was added "I think I said that: a prudent man, skilful man, with his experience just as he stood there on the car." He gave the third request with other instructions, in the course of which he stated: "I take it that it is a question . . . whether the motorman saw the truck over there soon enough so that as a reasonably careful, skilful motorman . . . with his experience, he did what he ought to have done. I take it that that is the real issue." Then followed another conference at the bench, not in the hearing of the jury, at which time counsel for the defendant excepted to so much of the charge as allowed them "to find negligence on the part of the motorman, and take into account his skill."

While in certain parts of the charge the jury were correctly instructed that the motorman was bound to exercise the care of a reasonably prudent man under the circumstances, in other parts it appears they were told in substance that he was required to exercise the care of a reasonably prudent man "with his skill," and that he was bound to act with the care of "a reasonably careful and skilful man." In this respect the charge was erroneous. The standard of duty is not the skill, caution and foresight that the motorman at that time was capable of, but it was the care of a reasonably prudent man standing in his place, in view of the existing circumstances. As was said by Tindal, C. J., in *Vaughan* v. *Menlove*, 3 Bing. (N. C.) 468, 475; *S. C.* 4 Scott, 244: "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought

rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Lang* v. *Boston Elevated Railway*, 211 Mass. 492. *Cayzer* v. *Taylor*, 10 Gray, 274, 280. *Commonwealth* v. *Pierce*, 138 Mass. 165, 176. *Brick* v. *Bosworth*, 162 Mass. 334, 338. *Keith* v. *Worcester & Blackstone Valley Street Railway*, 196 Mass. 478, 482. *Altman* v. *Aronson*, 231 Mass. 588, 591. This exception must be sustained.

6. There was evidence that the automobile truck was owned by one Ryan and was duly registered; and it was admitted that the witness Seymour was licensed to operate it. If it be assumed that it was operated contrary to law because a temporary number plate was used without authority, still it could not have been ruled as matter of law that the momentary act of the plaintiff's intestate in attempting to crank the truck at a time of imminent peril in order to get it off the track, made him an operator under St. 1915, c. 87; nor would such act warrant the jury in so finding, nor would a finding be warranted that he knew or had reasonable cause to know that it was operated in violation of law. St. 1915, c. 87, § 1. It follows that the tenth and eleventh requests were rightly refused.

Exceptions sustained.

NEW YORK CENTRAL RAILROAD COMPANY *vs.* STURTEVANT AND HALEY BEEF AND SUPPLY COMPANY.

SAME *vs.* S. S. LEARNARD COMPANY.

Suffolk. March 7, 1920. — May 20, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Contract, Validity, Implied. *Carrier*, Of live stock.

A provision in a contract made by a railroad corporation in the State of Illinois for the shipment of live stock from Chicago in that State to Boston, that the shipper was "at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same," is valid and, in the absence of wanton

or reckless misconduct on its part, relieves the corporation from any duty at common law to the shipper and to the consignee to load and to take care of and to feed and water the live stock while in transportation under the contract.

A railroad corporation, which habitually had accepted cattle from a certain shipper at Chicago in the State of Illinois for shipment to Boston in this Commonwealth under a contract containing the provision above described, in order to comply with the requirements of 34 U. S. Sts. at Large, 607, previous to July, 1913, at a certain point in the shipment had caused the stock to be fed uniformly at the rate of one hundred pounds of hay per carload. The cattle were of a special type such that this practice was reasonable, adequate to their special needs and involved no element of cruelty, and they reached Boston in good condition and without appreciable loss of weight. In May, 1913, the federal department of agriculture issued a circular, which, without the force of law, represented the "views of the department" to be that a proper feeding would be at a rate which would require three hundred pounds of hay per carload for these shipments, and the railroad corporation in July of that year caused the feeding to be done at that rate, but, it appearing that much of the feeding so furnished was not consumed, it returned to the practice of feeding but one hundred pounds to the carload in the yards, placing the two hundred pounds, which constituted the remainder of the three hundred pounds suggested by the department of agriculture, in the cars as they continued their journey. The shipper demanded of the railroad corporation that it cease placing the two hundred pounds in the cars but the railroad corporation insisted upon continuing and did continue the practice because of the ruling of the department of agriculture. During the rest periods neither the owner nor the shipper of the cattle exercised their right or option of feeding the animals. The consignee refused to pay for the two hundred pounds placed in each of the cars at the point of rest. In an action by the railroad corporation against the consignee for the value of the two hundred pounds of hay per each carload thus placed in the cars, it was *held*, that

(1) The railroad corporation after the demand by the shipper had no authority from him to furnish feed beyond what was reasonably adequate for the special needs of the cattle;

(2) The railroad corporation did not have a right, superior to that of the shipper, to dictate what was a reasonable amount of feed to be given to the cattle while in transportation;

(3) One hundred pounds of hay per carload at the point of rest having been found to have been reasonable and adequate for the special needs of the cattle and the shipper having demanded that no more be furnished by the railroad corporation on his account, the consignee was not liable for any feed furnished beyond that amount after the shipper's demand.

At the trial of the action above described, there was admitted, subject to objections by the plaintiff, evidence tending to show that the shipper, during the years of the shipments in question in the action, had placed two hundred pounds of hay upon each car at Chicago and had given to the initial carrier there memoranda including instructions to feed one hundred pounds per car at the point of rest; and, it having appeared that, five years after the time of the shipments in question, the plaintiff had changed its method and had begun feeding two hundred pounds of hay per carload at the point of rest and placing no hay in the cars outbound from there, following the promulgation of a further circular by the

federal department of agriculture suggesting that the views of that department as to the minimum requirements of the law would be met by furnishing not less than two hundred pounds of hay or its equivalent per carload, the defendants, subject to further objections by the plaintiff, were permitted to introduce further evidence tending to show that, following that change by the plaintiff, the shipper ceased to place any hay in the cars at the point of shipment. *Held*, that the evidence objected to by the plaintiff was relevant upon the issues raised by it, and that it was admitted properly.

At the trial in the Municipal Court of the City of Boston of the action above described, the plaintiff objected to the admission of certain evidence and filed a request for a report stating its objections and the rulings of the judge thereon. The judge found for the plaintiff. The plaintiff did not file a draft report. At the request of the defendant the action was reported to the Appellate Division, who dismissed the report, and the defendant appealed. The record in this court contained a statement of the rulings admitting the evidence to which the plaintiff had objected, and the plaintiff in this court urged that, if the rulings of the trial judge ordering judgment for the plaintiff were wrong, and the rulings admitting evidence to which it had objected also were wrong, the action should be remanded to the trial court for a new trial. This court, in reversing the order of the Appellate Division dismissing the report of the rulings ordering judgment for the plaintiff, *stated* that no question arose as to the form of the report, and *held* that the evidence objected to by the plaintiff properly was admitted, and that judgment should be entered for the defendant.

TWO ACTIONS OF CONTRACT, in each of which the plaintiff sought reimbursement for money paid by it for the feeding and bedding at East Buffalo in the State of New York of carloads of live stock consigned to the defendant and being transported by the plaintiff. Writs in the Municipal Court of the City of Boston dated May 13, 1915.

In the Municipal Court the actions were tried together. The material evidence and findings of the trial judge are described in the opinion. The defendants there asked for the following rulings of law:

"5. There being no statutory requirement for feeding cattle after end of one rest period until another rest period arrives, carrier can not require payment for food furnished to cattle in cars in which they were transported after expiration of rest period, except upon proof of an express or implied contract with owner or person in custody thereof to pay for feed so furnished after expiration of rest period.

"6. The carrier is not authorized by law to substitute a feeding in cars after expiration of rest period and while cattle are in transit for the feeding in properly equipped pens required by the statute.

"7. The evidence shows that only one hundred pounds per car was fed to cattle during the rest period prescribed by said statute.

"8. The evidence shows that defendants have already paid for the one hundred pounds per car so fed to the cattle during the rest period.

"9. The evidence shows that the shipper and consignee protested against the placing of two hundred pounds or any other amounts of hay in the cars in which the cattle were transported after the statutory rest period and have continuously refused to pay for same.

"10. The evidence fails to show either an express or implied contract on the part of the owners or person in custody of the cattle to pay for the amounts of hay placed in the cars in which the cattle were placed after the expiration of the rest period and while the cattle were in transit."

Upon these requests, the judge ruled as follows: "As I read the fifth and tenth requests, what is meant by the word 'implied' therein is 'implied in fact.' So reading these two requests, I refuse them. I give the sixth ruling requested, substituting the words 'the statute' for the word 'law.' Without that substitution I refuse it. I refuse the seventh, eighth and ninth requests as rulings of law, but I find the facts therein recited. In view of the ruling which I have already made, I deem it unnecessary to dispose in detail of the plaintiff's requests."

The judge also found and ruled as follows: "I find also that, taking into account the miscellaneous character of shipments passing through the East Buffalo yards, the conflict of expert opinion as to what constituted a proper feeding, the fact that Swift and Company did not assume itself to do the feeding over the entire trip, and that there was at the yards government inspection, placed there to secure compliance with federal law, the position which the plaintiff took in its letter of August [27], 1913, was a reasonable one. [This letter is quoted in the opinion.] So far as actual assent goes, neither party at any time acquiesced in the position taken by the other. In this situation, I rule that the plaintiff, by reason of its public service character, had the superior right to dictate within the bounds of reasonableness the terms of the bailments, as concerns feeding.

"I rule that the plaintiff cannot recover in this action by force

of the obligation imposed on it by the '28-Hour Law,' [34 U. S. Sts. at Large, 607,] for feed furnished in the cars. I also rule that it may recover outside the terms of that act, for feed reasonably furnished, and that its rights are not limited to those arising under the statute, and I find for the plaintiff upon the third count of its amended declaration, for the amount therein claimed, including interest."

At the request of the defendants, the actions were reported to the Appellate Division. The docket in the Municipal Court shows that the plaintiff also filed a request for a report; but it does not appear that it filed any draft of a report. The record in this court contains the following statement relating to the evidence referred to in the next to the last paragraph of the opinion:

"These findings of fact were reached upon evidence, part of which plaintiff objected to (under claim of report) as follows:

"1. William C. Watson, an employee of Swift and Company, having direct charge at Chicago of the shipment of their live stock during the years 1913 and 1914, was permitted to testify that at the time the cattle involved in these cases were loaded at Chicago for their movement toward Boston, two hundred pounds of hay were placed in each car before they were shipped.

"William Woods, live stock agent of Swift and Company at the East Buffalo stockyards during the years 1913 and 1914, was permitted to testify that two hundred pounds of hay were placed in the cars by Swift and Company at Chicago.

"This evidence was admitted over the objection and exception of the plaintiff based on the ground that it attempted to vary the terms of the written contract of shipment and was immaterial.

"2. The said Watson was also permitted to testify that the practice at the time of the shipments here involved was for Swift and Company's loaders to furnish to the agents of the initial carrier at Chicago written memoranda on a piece of scratch pad or an envelope bearing the name of the consignee, the weight and the number of the animals, the car numbers, and instructions to feed one hundred pounds at East Buffalo.

"This evidence was admitted over the objection and exception of the plaintiff based on the ground that (1) not being part of the original contract of shipment the method by which they were furnished did not constitute notice to the plaintiff, and (2) the

shipper could not limit by unreasonable instructions the plaintiff's public duty to properly feed the cattle.

"3. John H. Perhamus, live stock agent for the New York Central lines at East Buffalo, was permitted to testify on cross-examination that since the promulgation of the circular of the department of agriculture, dated April 23, 1919, (to the admission of this circular plaintiff consented) the plaintiff has changed its method and amount of feeding at the East Buffalo stockyards and now feeds two hundred pounds of hay in the yards and places no hay in the outbound cars. [The circular above referred to stated that, after further consideration of the feeding, watering and resting of cattle, the department concluded that "the use of a carload as a unit basis, rather than the hundredweight of animal, is a more satisfactory method for arriving at the amount of feed which should be given to the animals," and "that the handling of animals in accordance with the suggestions outlined below will meet the views of the department of agriculture as to the minimum requirements of the Law: . . . Cattle — Not less than 200 lbs. of hay, or its equivalent per car."]

"The said William C. Watson was permitted to testify that following the change in ration made by the plaintiff at East Buffalo in April, 1919, Swift and Company changed its practice respecting the amount of hay placed in the cars at Chicago and now places only one hundred pounds of hay in each car.

"This evidence was admitted over the objection and exception of the plaintiff, based on the ground that it was immaterial."

The report made at the request of the defendants was dismissed by the Appellate Division. The defendants appealed.

P. B. Smith, for the defendants.

C. O. Pengra, (*R. A. Stewart* with him,) for the plaintiff.

PIERCE, J. These two actions were tried together in the Municipal Court of the City of Boston. In each case the trial judge found for the plaintiff against the defendant on the third count of the declaration. These counts respectively are common counts upon an account annexed. In the action against Sturtevant and Haley Beef and Supply Company, the plaintiff says in that count that the defendant owes it $1,406.25 "charges accruing at East Buffalo between August 22, 1913, and October 7, 1914, in feeding and bedding carloads of live stock shipped by Swift and Company to

the defendant at East Cambridge according to the account hereto annexed, together with interest thereon from October 7, 1914, when the same became due and payable, and payment was refused." In the action against S. S. Learnard Company the plaintiff says in the corresponding count that the defendant owes it $589, "charges accruing at East Buffalo between November 29, 1913, and August 21, 1914, for feeding and bedding carloads of live stock shipped by Moag and Greenwald to the defendant at Brighton according to the account hereto annexed, together with interest thereon from August 21, 1914, when the same became due and payable, and payment was refused." Upon a report to the Appellate Division, the report was dismissed, and the cases are before this court on appeal from that decision. The defendants raise no question of their liability to the plaintiff as consignee for further charges sought to be recovered if their shippers are primarily liable for the payment of such charges. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 215 Mass. 36. *Union Freight Railroad* v. *Winkley*, 159 Mass. 133, 135. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536.

The shipments were made from Chicago and moved over the New York Central Railroad and its connecting carrier, the Boston and Albany Railroad, to the plants of the defendants in the neighborhood of Boston. The normal time consumed in transportation of live stock from Chicago to Boston was from fifty-six to sixty-four hours. All the shipments were under uniform live stock contracts, and each contained the provision "That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." In the absence of gross negligence, the quoted provision from the contracts made in Illinois, to be performed in part in that State and in part in other States, relieved the plaintiff from any common law legal duty to the shippers and to these defendants to load and take care of and feed and water live stock while in transportation under the contracts. *Brockway* v. *American Express Co.* 168 Mass. 257. *Cleveland, Cincinnati, Chicago & St. Louis Railway* v. *Patterson*, 69 Ill. App. 438. It is held by a

great number of decisions collected in 10 C. J. 95, note 44, that such a contract is valid.

The Act of Congress, June 29, 1906, c. 3594, 34 U. S. Sts. at Large, 607, was in force during the entire time covered by the accounts annexed to the plaintiff's declarations. So far as pertinent to the present case, that act provides: "That no railroad . . . transporting cattle . . . through another State . . . shall confine the same in cars . . . for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours. . . . That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad . . . at the reasonable expense of the owner . . . but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires." Pursuant to § 1 of the act, the time of confinement in the case of each shipment was extended to thirty-six hours upon the written request of the owner.

The cars in each shipment were moved with reasonable dispatch and the cattle were unloaded into properly equipped pens for rest, water and feeding at the East Buffalo stockyards, where the New York Central Stockyard Company provided them with substantially three hundred pounds of hay per carload, the expense of which was billed to and paid by the railroad in due course. The amount of the charges at the rate of $1.50 per hundred pounds of hay was in accordance with the railroad's tariff duly filed with the Interstate Commerce Commission, and is not in dispute. Previous to July 1, 1913, Swift and Company habitually had shipped from Chicago and nearby points to the defendant Sturtevant and Haley Beef and Supply Company, carloads of cattle which uniformly had been fed at the rate of one hundred pounds per carload at East Buffalo by the local stockyard company, whose charges therefor were repaid by the consignee. Swift and Company habitually had placed in each car at Chicago two hundred pounds of hay and the plaintiff habitually had fed in the yard at East Buffalo one hundred pounds of hay per carload. In the action against S. S. Learnard Company there was no evidence that the shipper supplied feed at the point of shipment. The

shipments to the defendants "were of a special type — choice, heavy, fatted, corn-fed cattle, designed for the Boston market, and [those shipped to Sturtevant and Haley Beef and Supply Company] fed to repletion at the shipping points, where they were weighed to fix their sale price. Such cattle would not take hay at the Buffalo yards as freely as cattle from the ranges." The trial judge specifically found "As to such cattle . . . that the practice obtaining before July 1, 1913, was reasonable, adequate to their special needs, and involved no element of cruelty. All the evidence is to the effect that they reached Boston in good condition and without appreciable loss of weight."

On May 31, 1913, the Department of Agriculture issued a circular which without force of law represented the "views of the Department" as to the amount necessary to constitute proper feeding under the U. S. St. of June 29, 1906. It advised in substance that a proper feeding would be at the rate of one and a quarter pounds per hundred weight of animals, which would mean substantially three hundred pounds per carload for these shipments. Shortly thereafter the stockyard company began yard feeding at that rate; but, it appearing that much of the hay so furnished was not consumed, it returned to the practice of feeding one hundred pounds per carload in the yards, and placed the remaining two hundred pounds in the cars east-bound from the stockyard.

On August 23, 1913, Swift and Company wrote to the plaintiff: "As these cattle shipments will be fed 100 lbs. of hay per car in yards, do not want any more hay put in cars, when cattle are loaded out. Please advise if you will arrange accordingly." On August 27, 1913, the plaintiff replied: ". . . with reference to shipments of cattle for Sturtevant & Haley which are unloaded for feed, water and five hours rest and which you request be fed but 100 lbs. of hay per car. In view of Ruling issued by the Department of Agriculture, recently, which provides that cattle should be fed 1¼ pound of hay per hundredweight of animals, I cannot see my way clear to comply with your request. Therefor[e], we shall continue to feed 100 lbs. of hay in the yard putting the balance in the cars when the animals are reloaded." The plaintiff continued to refuse the shipper's request, and fed one hundred pounds of hay in the yard, put two hundred pounds in each car,

and sent its bill for three hundred pounds to the defendant. After the refusal, Swift and Company sent, and the plaintiff received, shipments of cattle for more than a year.

On December 19, 1913, the defendant S. S. Learnard Company wrote to the plaintiff: "We beg to advise that in the future we shall refuse to pay feeding charges at the rate of $4.50 per car as recently billed. If it is later shown that the charge of $4.50 is a proper charge, we will of course pay same. . . . We will pay at rate of 1.50 car as formerly." On August 15, 1914, the plaintiff replied to the letter of December 19, 1913: "This matter has been reported to . . . and the entire question has been referred to their General Attorney, who has advised that if their Company had not fed the animals properly they would no doubt have been prosecuted by the Government, and in his opinion you are liable for the charges to cover the quantity of feed furnished this stock. Please advise if your decision is final and that it is your intention to force us to take measures to collect these charges." On September 9, 1914, this defendant replied: "We are still of the opinion that we should not be charged in excess of $1.50 per car and consequently shall have to decline payment of your charges of $4.50."

During the rest periods at East Buffalo neither the owner nor the shippers exercised the option of performing themselves the statutory duty of watering and feeding the animals, nor by themselves did they perform their contractual duty "to feed and water said stock whilst being transported." Because of these defaults the plaintiff perforce of the statute became obligated to perform the duty which the statute primarily places upon the owner and shipper of live stock; and it had "a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected." Irrespective of the requirements of the provisions of the statute, under the contract upon default of the owner or shipper to feed and water the animals whilst in transportation the plaintiff, at least to the extent of its common law duty, became the involuntary agent of the owner or shipper with an implied authority, if not with a positive duty, until its authority was revoked, to feed, water and rest the animals committed to its custody by the owner or shipper whenever and wherever such action became reasonably necessary to keep the animals in good condition or to

save them from unnecessary suffering. *Louisville & Nashville Railroad* v. *Spalding, Mimms & Co.* 8 Ky. L. Rep. 355. *Chicago, Burlington & Quincy Railroad* v. *Williams*, 61 Neb. 608. *Lewis* v. *Pennsylvania Railroad*, 41 Vroom, 132. The legal fact, if such be the law, that the plaintiff would not be liable to the owner or shipper in an action of negligence should loss or injury result from a failure to feed and water the animals following the time it had knowledge that the owner or shipper had neglected or refused so to do in breach of the owner's or shipper's contract with the plaintiff, does not stand in the way of the plaintiff's right to a reimbursement of money expended in behalf of the owner or shipper, which was necessitated by the breach of the contract or which was paid out in feeding and caring for the animals with the assent or silent acquiescence of the owner or shipper.

In the cases at bar the trial judge found that "The defendants from time to time made payments equivalent in amount to the 100-lb. feedings in the yards;" and that "the defendants intended to pay for the yard feedings and not for the car feedings, and that the plaintiff knew it." He ruled that the plaintiff had not the right to apply such payments to the car feedings, and further ruled "that the plaintiff cannot recover in this action by force of the obligation imposed on it by the '28-Hour Law,' for feed furnished in the cars." These rulings were clearly right. The plaintiff provided water, feed and rest facilities in each shipment at the rest pens in East Buffalo, and the defendants have paid the plaintiff the entire amount expended by it in feeding the animals at the rest pens.

It is the contention of the plaintiff, and the trial judge ruled, that the plaintiff could recover outside the terms of the act for feed reasonably furnished in the cars outside the rest pens, notwithstanding the request of Swift and Company on August 23, 1913, and of the S. S. Learnard Company on December 19, 1913, that no hay be placed in the cars in addition to the one hundred pounds fed in the yards. The plaintiff recognizes the elementary rule in the law of contracts that a permissive fact cannot be implied against the express declaration of a person sought to be charged under an implied contract, *Keith* v. *De Bussigney*, 179 Mass. 255, 259, but contends that the conduct of the owner, shipper and consignee gives rise to an implied promise despite the

verbal protest and command. *Central Bridge Corp.* v. *Abbott,* 4 Cush. 473. No question of a contract implied in law is open. Outside the terms of the express contract the law imposed no legal obligation on the owner, shipper or consignee to feed the animals in the cars, and the trial judge has expressly found that the practice obtaining before July 1, 1913, was reasonable, adequate to the special needs of the animals, and involved no element of cruelty. *Keith* v. *De Bussigney, supra. Morse* v. *Kenney,* 87 Vt. 445. We cannot agree with the contention of the plaintiff that the shippers lost the right to dictate what should constitute proper feeding when they threw the burden of feeding in transit on the railroad, and that the instruction to feed only one hundred pounds per car was unreasonable and void. *Keith* v. *De Bussigney, supra.*

It is plain on the facts that the S. S. Learnard Company is liable to the plaintiff for the money expended in its behalf with its knowledge between November 29, 1913, and December 19, 1913, when it first notified the plaintiff that it would refuse to pay the "charges at the rate . . . billed . . . [but] will pay at rate of 1.50 car as formerly." It is equally plain the Sturtevant and Haley Beef and Supply Company is not liable for money expended in its behalf, but contrary to its direction, after August 23, 1913. It results that the trial judge should have found for the defendant in the action against the Sturtevant and Haley Beef and Supply Company, and for the plaintiff in the action against the S. S. Learnard Company only to the amount proved to have been expended in its behalf between November 29, 1913, and December 19, 1913.

The evidence as to the feeding of the animals before they left Chicago, as to the instructions to the initial carrier, and as to the plaintiff's change in its method of feeding in the yard at East Buffalo, was properly received, as legally relevant to some one or more aspects of the plaintiff's contention.

No question arises as to the form of the report. It follows that the order, "Report dismissed," must be reversed in each action. Judgment is to be entered for the defendant Sturtevant and Haley Beef and Supply Company, and for the plaintiff against the S. S. Learnard Company, in accordance with this opinion.

So ordered.

KATHERINE WHITE *vs.* E. T. SLATTERY COMPANY.

Suffolk. March 8, 9, 1920. — May 20, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Negligence, Employer's liability. *Workmen's Compensation Act. Practice, Civil*, Abatement, Issues to jury, Separate trials of different issues, Ordering verdict, Exceptions. *Pleading, Civil*, Plea in abatement, Answer.

A defence to an action of tort at common law for personal injuries received after July 1, 1912, that at the time of the injuries the plaintiff was in the employ of the defendant who was a subscriber under the workmen's compensation act, St. 1911, c. 751, that at no time had the plaintiff given to the defendant notice under Part I, § 5 of the act that he claimed a right of action at common law to recover damages for personal injuries, and that therefore such right of action at common law was waived, is not matter in abatement, but is a defence in bar of the action.

The question, whether allegations contained in a pleading filed in defence of an action constitute matters in abatement or in bar, is to be decided, not by the form of the pleading, but by the substance of the allegations.

Description, by RUGG, C. J., of matters which properly may be pleaded in abatement in an action at law.

In an action of tort for personal injuries, the defendant filed a pleading entitled "Motion and Plea," which contained the allegations above described, and claimed a trial by jury upon that issue. At that trial the judge submitted to the jury one issue only, "At the time of the accident alleged . . . was she [the plaintiff] an employee of the defendant?" the jury answered, "She was not," and the defendant alleged exceptions. *Held*, that, the matter set out in the alleged "Motion and Plea" being in bar and not in abatement, the trial must be treated as a trial of a single issue in bar.

In the circumstances above described, it was *stated* that it was unnecessary to determine whether separate and distinct trials by jury of several defences in bar could have been had against the objection of a party, or whether in any case they ought to be permitted as matter of discretion; but that in a wise exercise of sound discretion there should have been but one trial involving all issues in bar of the plaintiff's claim.

After the trial of the single issue above described, there was a further trial of the action upon the general issue, at which the trial judge ordered a verdict for the defendant, and the plaintiff alleged exceptions. In determining whether there was evidence warranting the submission to the jury of the special question, "At the time of the accident . . . was she [the plaintiff] an employee of the defendant?" the facts and evidence described in the plaintiff's bill of exceptions saved at the trial of the general issue, as well as those described in the defendant's bill of exceptions saved at the trial of the special issue, were taken into consideration.

A woman was employed as a buyer of millinery under a general contract in writing

for a year at a stipulated weekly salary by the proprietor of a store occupying an entire building in a city, and was given by her employer a regular lunch hour to do with as she saw fit. The employer was a subscriber under the workmen's compensation act and the woman had given no notice under Part I, § 5 of the act, that she claimed a right of action at common law for personal injuries. On a certain day the woman elected to take her lunch hour in a workroom in the store and sent another employee to purchase for her some food and some tickets for an evening performance at a theatre, and, upon the employee returning with the food but without the tickets, she partook of her lunch and then started to leave the store to purchase the tickets and was injured in an elevator in the store on her way out. *Held*, that the injury to the woman arose out of and in the course of her employment and that she was not entitled to maintain an action at common law against the proprietor of the store.

In an action by a woman against the proprietor of a store for personal injuries, the defendant filed a "Motion and Plea," in form a plea in abatement, alleging that, at the time when the plaintiff received the injuries, she was an employee of the defendant, was subject to the provisions of the workmen's compensation act, had given no notice that she claimed a right of action at common law for personal injuries and was not entitled to maintain the action. The defendant also filed an answer, without waiving the "plea," denying generally the allegations of the declaration and specifically setting up the same defence as that stated in the "Motion and Plea." The action was referred to a jury for trial of the sole issue, whether, when injured, the plaintiff was an employee of the defendant, that issue was answered in the negative and the defendant alleged exceptions. Thereafter the action was tried upon the general issue, the trial judge at the close of the evidence ordered a verdict for the defendant, and the plaintiff alleged exceptions. This court, having decided that the matter alleged in the "Motion and Plea" was in bar and not in abatement, that the trial of the single issue must be treated as a trial of an issue in bar, that, upon all the evidence at both trials, as a matter of law the injuries received by the plaintiff arose out of and in the course of her employment and that the plaintiff, not having given the notice required by the workmen's compensation act, was not entitled to maintain the action at common law, sustained the defendant's exceptions, ordered judgment for the defendant, and, without examining into the merits of the ruling of the judge at the trial of the general issue, *held*, that the plaintiff was not harmed by that ruling and that the plaintiff's exceptions must be overruled.

TORT for personal injuries, received by the plaintiff when in the act of alighting from an elevator in the store of the defendant, which occupied an entire building on Tremont Street in Boston, the declaration as amended containing only allegations in general terms that on August 30, 1912, the plaintiff, while in the exercise of due care, received serious injury on account of the negligence of the defendant, its agents and servants. Writ dated October 16, 1916.

The defendant filed a document, entitled "Motion and Plea," which is described in the opinion, and also, without waiving that

"Motion and Plea," an answer containing a general denial of the allegations of the writ and declaration and also allegations specifically setting forth in bar the same facts as were alleged in abatement in the "Motion and Plea."

The defendant claimed a jury trial upon the alleged "Motion and Plea," and there was a separate trial on the issue there joined before *Sisk*, J., who submitted to the jury a special question, "At the time of the accident alleged in the plaintiff's amended declaration, was she [the plaintiff] an employee of the defendant?" The jury answered, "She was not;" and the defendant alleged exceptions.

The action then was tried upon the general issue before *White*, J. At the close of the evidence, by order of the judge, a verdict was entered for the defendant; and the plaintiff alleged exceptions.

Material evidence set forth in both bills of exceptions is described in the opinion.

G. Gleason, for the defendant.

J. J. O'Hare & J. P. Sylvia, Jr., for the plaintiff.

RUGG, C. J. This is an action of tort wherein the plaintiff seeks to recover compensation for injuries sustained by her in 1912. The plaintiff filed a declaration briefly but adequately setting forth her cause of action. Thereupon the defendant filed a paper which it entitled, "Defendant's Motion and Plea." The substance of this pleading was that at the time of the injuries alleged in the plaintiff's declaration she was in the employ of the defendant and that the defendant was a subscriber under the workmen's compensation act, St. 1911, c. 751, and that the plaintiff had at no time given notice in writing to the defendant under Part I, § 5 of the act, that she claimed a right of action at common law to recover damages for personal injuries, and that hence her right of action at common law was waived, "Wherefore the defendant prays that the writ in said action may abate."

The substantive facts set forth in this pleading do not constitute matter in abatement, but in bar. A plea in abatement goes to the form of the writ; a plea in bar goes to the cause of action. *Whiton* v. *Balch*, 203 Mass. 576, 578. Any fact which impeaches the form of the writ, the timeliness of the action, the capacity of the parties, or such like matter not attacking the foundation of the cause of action, properly may be pleaded in

abatement. Misnomer or any misdescription of parties, *Trull* v. *Howland*, 10 Cush. 109, 112, *Day* v. *Floyd*, 130 Mass. 488, *Anderson* v. *Qualey*, 216 Mass. 106, 108, non-joinder of necessary parties, *Feigenspan* v. *McDonnell*, 201 Mass. 341, 345, *Townsend* v. *Wheatland*, 186 Mass. 343, the bringing of the writ in wrong county, *Silver* v. *Graves*, 210 Mass. 26, 32, pendency of prior suit between the same parties for the same cause, *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299, 302, *Moore* v. *Spiegel*, 143 Mass. 413, that the plaintiff is not owner of or for any reason is not entitled to prosecute the cause of action either for his own benefit or that of another, *Fay* v. *Guynon*, 131 Mass. 31, 34, temporary inhibition operating on the plaintiff, *National Fertilizer Co.* v. *Fall River Five Cents Savings Bank*, 196 Mass. 458, coverture, *Hayden* v. *Attleborough*, 7 Gray, 338, the disability of being an Indian, *Jaha* v. *Belleg*, 105 Mass. 208, of being an alien enemy, *Friedenwald Co.* v. *Warren*, 195 Mass. 432, 434, infancy, *Smith* v. *Carney*, 127 Mass. 179, or other disability of plaintiff, *Chamberlayne* v. *Nazro*, 188 Mass. 454, must be taken advantage of by plea in abatement. Certain matters like non-existence of corporation made party to the action, *Whiton* v. *Balch*, 203 Mass. 576, and cases cited, non-tenure in real actions, *Dewey* v. *Brown*, 5 Pick. 238, that the action is prematurely brought, *Franklin Savings Institution* v. *Reed*, 125 Mass. 365, that party is alien enemy in real actions, *Hutchinson* v. *Brock*, 11 Mass. 119, may be pleaded either in abatement or in bar.

The question whether a matter is in abatement or in bar is to be decided, not by the form in which it is presented, but by its substance. If it is essentially in bar of the action, it will be so treated and considered even though cast in the form of a plea in abatement. *Merriman* v. *Currier*, 191 Mass. 133, 141. *Davis* v. *Carpenter*, 172 Mass. 167, 172. *Allin* v. *Connecticut River Lumber Co.* 150 Mass. 560, 563.

The facts that the defendant was a subscriber under the workmen's compensation act and that the plaintiff was its employee and had not reserved her common law rights as provided in Part I, § 5 of that act, if found to be true, were a complete bar to the cause of action set out in the plaintiff's declaration provided the injury of which she complained arose out of and in the course of that employment. *Young* v. *Duncan*, 218 Mass. 346. *Gilbert* v.

Wire Goods Co. 233 Mass. 570. See *Southern Pacific Co.* v. *Industrial Accident Commission of California*, 251 U. S. 259. These facts did not constitute any disability attaching to the plaintiff, nor any defect in the writ. In short, they do not relate to any matter of form. These facts would not enable the plaintiff to frame a more perfect writ. On the contrary, they went to the very vitals of the plaintiff's action. They showed that she never had, did not have at the date of the writ, and never could have a cause of action at law against the defendant arising out of the incident of which she complained. They demonstrated that her only remedy was under the peculiar procedure afforded by the workmen's compensation act, which is not an action at law at all. It properly, therefore, should have been pleaded in bar and must be treated now as a matter in bar.

In *Young* v. *Duncan*, 218 Mass. 346, the question was raised by a paper entitled "Motion and Plea" which both parties "treated . . . as a plea in abatement," and the case was decided on its merits. That case affords no authority for the contention that the facts here or there pleaded constitute anything else than proper ground for a plea in bar.

This case comes before us on two bills of exceptions. The first one is entitled "Defendant's bill of exceptions with reference to trial on the plea in abatement." It relates to the trial to a jury upon the plea in abatement, incorrectly so called as has been pointed out, for the purpose as therein stated "of determining whether the plaintiff was an employee of the defendant within the meaning of that term as used in the workmen's compensation act." It is unnecessary to determine whether separate and distinct trials by jury of several defences in bar could have been had against the objection of a party or whether in any case they ought to be permitted as matter of discretion. See St. 1913, c. 716, § 2. Ordinarily such separate trials would seem a hardship upon the parties and a burden upon the public treasury.

The facts in their aspect most favorable to the plaintiff, as shown by the whole record in both bills of exceptions, are that the plaintiff was under a general contract of employment with the defendant for the year 1912 at a stipulated weekly salary as its buyer of millinery. She worked in the defendant's store in Boston and spent much of her time on the second and fifth floors, where

were the show rooms and work room, and every day visited the basement to meet jobbers. She had a regular lunch hour between one and two, to do with as she saw fit. "The plaintiff further testified that on the day of the accident she, electing to take her lunch in the workroom on the fifth floor, sent her sister Elizabeth, who was one of her assistants, out to purchase some food and two theatre tickets for the evening performance at Keith's. Elizabeth returned with the food for lunch only, having forgotten the theatre tickets, whereupon the plaintiff, after partaking of the lunch, decided to go out and purchase the theatre tickets herself. About twenty minutes after one the plaintiff put on her street clothing, hat, gloves and wrap, and with the express and sole intention of leaving the store to purchase the aforesaid theatre tickets for herself and her mother, she entered the elevator on the Tremont Street side of the store; . . . the plaintiff at this time was using the elevator to do an errand of her own in which the defendant was in no wise interested. While alighting from the elevator at the street floor on her way to the theatre, the plaintiff received injuries . . . on account of the alleged negligence of the defendant company, its agents and servants." The elevator on which the injury occurred was in the store of the defendant and was used in common by its customers and employees. It is not disputed that the defendant was a subscriber under the workmen's compensation act, subject to all the liabilities and entitled to all the rights accruing therefrom.

There is no evidence tending to show, and the plaintiff does not contend, that she had given the notice required by Part I, § 5 of the act as a condition precedent in order to enable her to maintain an action at common law for injuries arising out of and in the course of her employment.

The only reasonable inference of which these facts and the evidence are susceptible is that the injury to the plaintiff arose out of and in the course of her employment. She was within the store of her employer. The only occasion for her presence there at the time and place was the fact of her employment. When she entered the store on her way to work and pursued the proper course to the place of her labors, while there in the performance of her duties as employee and until she had left the store by the ordinary means of exit, she was engaged in the pursuit of her employment, entitled

to the protection and subject to the limitations of the workmen's compensation act. Numerous of our cases illustrate the principle that the sphere of employment exists and affords its shield to the employee while within the premises of the employer on the way to or on the return from actual performance of the specific duties of the employment. *Sundine's Case*, 218 Mass. 1. *Stacy's Case*, 225 Mass. 174. *O'Brien's Case*, 228 Mass. 380. *Uzzio's Case*, 228 Mass. 331. *Hallett's Case*, 230 Mass. 326; 232 Mass. 49. See *O'Toole's Case*, 229 Mass. 165, 167, and *Rochford's Case*, 234 Mass. 93. Several cases decided under the English act go quite as far as our own decisions in this direction. See, for example, *John Stewart & Son*, [1912] *Ltd.* v. *Longhurst*, [1917] A. C. 249; *Moore* v. *Manchester Liners, Ltd.* [1910] A. C. 498; *Charles R. Davidson & Co.* v. *M'Robb*, [1918] A. C. 304; *Webber* v. *Wansborough Paper Co. Ltd.* [1915] A. C. 51; *Lancashire & Yorkshire Railway* v. *Highley*, [1917] A. C. 352.

The plaintiff was leaving the store of her employer with the purpose of doing an errand on her own account having no relation to her employment. That fact is of no consequence under these circumstances. She was doing it on her own time and not on her employer's time. She was in this particular in the same condition as she would have been if leaving the store at the end of her labor for the day. She had a right under the terms of her employment to go out at the lunch hour on her own affairs. She was as much within the scope of her employment as were any of the employees in the cases cited where they have been held within the protection of the act.

The case at bar is distinguishable from *Ross* v. *John Hancock Mutual Life Ins. Co.* 222 Mass. 560. In that case the plaintiff was leaving the public elevator in her employer's building, occupied by many other tenants as well as by itself, at a floor other than that of her employment or general place of exit on an errand of her own, and it was held that she had so far as concerned her employment left the premises of the employer. She was as much away as if in another office building to visit a friend. In the case at bar the plaintiff was using the ordinary means of leaving her employer's premises in the usual way, but had not left the part where her employment carried her. It follows that at the trial to which the first bill of exceptions relates, the fifth request of the

defendant that a verdict be ordered in its favor on the ground that the plaintiff was an employee under the workmen's compensation act at the time of the accident and received an injury, which arose out of and in the course of her employment, should have been granted.

The question submitted to the jury was this: "At the time of the accident alleged in the plaintiff's amended declaration, was she an employee of the defendant?" No objection appears to have been made to the form of the question. The jury returned this answer: "She was not."

The case then came on for a second trial to a jury on the general issue. The judge ordered a verdict in favor of the defendant. The plaintiff's exception thereto constitutes the second bill of exceptions. It is not necessary to decide whether there was error in this ruling on the evidence set forth in that bill of exceptions on the assumption that the finding of the jury had at the first trial must stand, for the reason that, if there was, the plaintiff has suffered no harm. A verdict should have been ordered on all the evidence disclosed in both bills of exceptions on the grounds already stated, viz., that, the plaintiff being an employee of a subscriber under the workmen's compensation act and not having taken the steps necessary to retain her rights to an action at common law, and the injury having been received and having arisen out of and in the course of her employment, she could not maintain an action at common law. This ground in its essence is fatal to her right to recovery on the merits in an action at common law. As it seems to us, in the wise exercise of sound discretion there would have been but one trial involving all issues in bar of the plaintiff's claim. If that course had been pursued, a verdict should have been ordered for the defendant on all the evidence for the reasons stated. Without deciding, however, that issues of substance never can be divided and tried separately to a jury, it is enough to say that, as matter of correct rulings of law, a verdict should have been ordered in favor of the defendant on the first trial and then there would have been no second trial. But the second trial having been had and a final verdict having been rendered which was right in its result, it need not be disturbed.

The defendant's exceptions must be sustained and judgment ordered in its favor under St. 1909, c. 236. It is familiar law that

a right ruling will be sustained although a wrong reason was given. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 384. Although the direction of the verdict at the second trial does not fall within the letter of this rule, it comes within its spirit and its substance. It accomplished the result which is inevitable on the whole record. The entry may be

Defendant's exceptions sustained and judgment entered for the defendant under St. 1909, c. 236. Plaintiff's exceptions overruled.

JOHN W. PRENTISS *vs.* CITY OF GLOUCESTER & others.

Essex. January 13, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Way, Private. *Easement. Deed*, Implied grant of right of way, Plan. *Land Court*, Exceptions, Findings by judge, Notice.

Upon exceptions, by certain respondents in a petition in the Land Court for the registration of the title to a certain parcel of land on Eastern Point in Gloucester, to rulings that the respondents were not entitled to a right of way over the petitioner's land, it was *held* that there was no necessity for considering what rights of way, if any, owners of land on the Point, other than the excepting respondents, might have, except so far as the existence of such rights might be pertinent to the exceptions.

Plans of land on Eastern Point in Gloucester had delineated thereon ways, called, respectively, "Eastern Point Boulevard (West)" and "Eastern Point Boulevard (East)," Eastern Point Boulevard (West) beginning at a park lodge at the northwesterly corner of the Point, and in general followed the line of the shore of Gloucester Harbor to the southern part of the Point, where Eastern Point Boulevard (East) began and ran along the shore of the ocean past a fresh water lake, when it turned and converged with Eastern Point Boulevard (West) somewhat southerly of the gate lodge. The two ways were continuous and there was no well defined point of demarcation at the south. Deeds of parcels of land bounding on the respective ways treated them as two independent ways. At the trial of a petition for the registration of the title to a parcel of land on the ocean side of the Point, certain respondents who owned land on the harbor side bounding on Eastern Point Boulevard (West) claimed that Eastern Point Boulevard (East) traversed the petitioner's land and that they had rights of way thereon. At the request of the respondents, the judge who heard the petition ruled that, for the purposes of the rule that a grantee of land bounded in a deed on a private way belonging to the grantor and in existence as shown on a plan referred to in the deed acquires a right to use the way in both directions so far as the grantee owns provided it is reasonably necessary to the advantageous use

of the granted premises that he should have such right, it is immaterial that the name of the way changes at a certain point in its course. Subject to an exception by the respondents, the judge refused a request for a ruling, "For the purpose of determining the extent of rights of way impliedly granted to the purchasers of lands on Eastern Point, Eastern Point Boulevard (East) and Eastern Point Boulevard (West) are to be treated as a single road" and ordered a decree for the petitioner, excluding any right of way for the respondents. *Held*, that

(1) The order for registration imported a finding of all subsidiary facts essential to support it;

(2) The refusal of the ruling requested was warranted.

Where a large tract of land is plotted into numerous lots bounded on many different ways, and deeds of the several lots contain no express grant of rights in the ways shown on the plan, a grant by implication of an onerous servitude in the nature of rights in the ways will not be presumed where such rights are not necessary for the enjoyment of the land conveyed, unless such grant clearly is shown to be intended by the parties to the deed.

A reference in a deed to a plan showing ways as above described, although accompanied by its use for description of bounds, will not convey to the grantee rights in the ways not necessary for the enjoyment of the premises where no intent to make such a grant appears in the deed.

The necessity, in contemplation in ordinary cases, for the use of ways such as those above described, is that of access to public ways.

The great desirability of a way for purposes of prospect does not make the use of a way, such as is above described, necessary to the granted premises.

No grant by implication of a right of way over Eastern Point Boulevard (East), above described, arose from deeds of lots on Eastern Point Boulevard (West) and in the northeastern portion of the Point, Eastern Point Boulevard (East) not being mentioned in the deeds nor shown on plans accompanying them and its use not being necessary for access from the granted premises to a public way.

At the hearing of the petition above described, it appeared that the common grantor of the petitioner and of the respondents filed in the registry of deeds an index map, representing Eastern Point as divided into sections, designated by letters. This map showed Eastern Point Boulevard (East) as crossing the land later acquired by the petitioner. The respondents' deeds were accompanied by plans and contained reference to single sections of the index plan not juxtaposed to the petitioner's land and showing no part of it. *Held*, that

(1) The fact, that the detailed plan of the separate sections related to one large tract and might be fitted together, did not make them one plan in legal effect;

(2) The index plan did not create nor enlarge easements described in the deeds to the respondents, since it was not referred to therein for that purpose.

Where a deed of land contains a provision specifically defining rights of way which are appurtenant to the land conveyed, no easement in other ways on land of the grantor can be created by implication.

At the hearing of the petition above described, it appeared that, prior to the deed to the petitioner, his grantors had executed and delivered to the city of Gloucester an instrument in the form of a deed granting to the city "the right to lay, relay, and maintain water pipes and place hydrants for the purpose of conveying and using water in or under certain private ways owned by us and situated in the said lands at Eastern Point in said Gloucester, viz: all ways now existing

and in use through said lands, and also in or under any and all ways which may hereafter be laid out or constructed by said Company or its Trustees through said lands." At that time a way was in existence and in use over the land afterwards conveyed to the petitioner, although no water pipes had been laid there. The judge of the Land Court ruled, subject to an exception by the city, that the city had no easement or other rights in the road in question over the petitioner's land. *Held*, that the ruling was wrong and that the exception must be sustained.

In making the decision, above stated, as to the rights of the city of Gloucester in the land of the petitioner, it further was *stated*, that the effect of the easement given to the city as to ways which might thereafter "be laid out or constructed" by the grantors and their successors was not determined.

A refusal by a judge of the Land Court to grant a request for a finding of fact is not subject to an exception.

A respondent in a petition in the Land Court, if he has a full opportunity to be heard, is not harmed by a refusal by the judge to give further notice to other persons who do not appear in the proceedings.

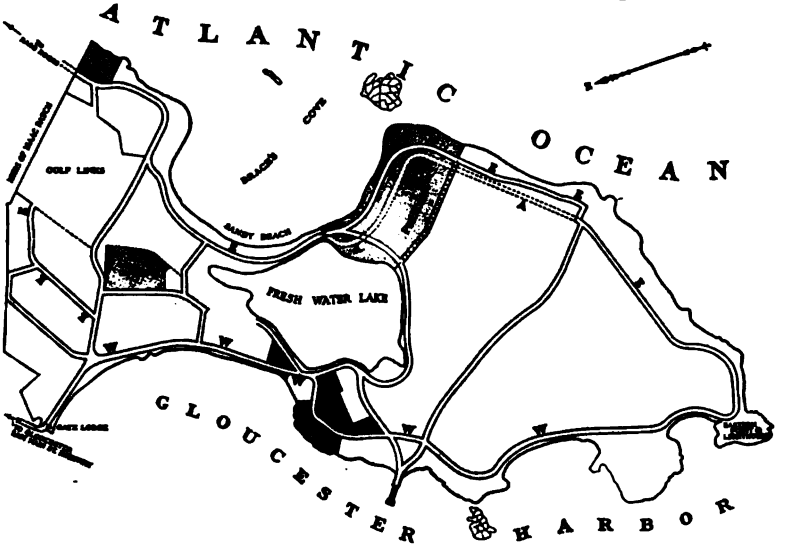
PETITION, filed in the Land Court on March 20, 1919, for the registration of the title to land on Eastern Point in Gloucester.

The respondents were the city of Gloucester and the Attorney General, who claimed certain public rights described in the decision of the judge of the Land Court; George O. Stacy; Herbert E. and Arthur W. Smith; and Joseph O. Procter, William H. Jordan and Joseph O. Procter, Jr., Trustees, all of whom claimed "a right of way across the parcels described in the petition, on the location of the present Eastern Point Boulevard (East)."

A sketch plan, compiled from several of the exhibits in evidence at the hearing in the Land Court and from statements in the bill of exceptions, is shown on the next page. The petitioner's land is marked, thereon, "Petitioner"; land of the respondent Stacy is marked "ST."; land of the respondents Smith is marked "SM."; land of the respondents Procter, Jordan and Procter, Jr., Trustees, is marked 'PRO."; Eastern Point Boulevard (East), as designated on some of the plans referred to in the opinion, is marked "EEEEE," (a portion of it being shown on one plan as crossing the petitioner's land at "AA";) and Eastern Point Boulevard (West) is marked "WWWWW." As stated in that part of the decision of the judge of the Land Court quoted on page 42, neither course of Eastern Point Boulevard (East) across the petitioner's land, shown on the sketch plan, is described or shown on the petitioner's deed from the Trustees of the Eastern Point Company.

In the Land Court, the petition was heard by *Davis*, J. His decision and order for a decree, which were annexed to the bill of exceptions, were in part as follows:

"This is a petition for registration of title to a tract of land at Eastern Point, Gloucester, containing a little over twenty acres of upland, together with the rocks at the southeasterly end of Brace's Cove, known as Brace's Rocks. The respondents all



claim rights of way in a road running close to the shore through said land. This constitutes the principal matter in controversy.

"Some of the respondents claim public rights of way over the road in question acquired by adverse use, and some private rights of way acquired by express or implied grant. The claim to public rights of way has been made on behalf of the public at the instance of certain citizens of Gloucester and of an improvement association of summer residents at Bass Rocks, a summer colony situated to the north of Eastern Point, by the city solicitor and the Attorney General. There is a further claim on behalf of the public of a right by prescription over Brace's Rocks. No evidence was presented showing any rights by prescription in or over Brace's Rocks, and I find that no such rights exist. Much evidence was presented as to the claim of public rights of way, and, while counsel for the city and the Attorney General did not care to argue the matter the claim was expressly not waived by them.

"In 1887 the southerly portion of Eastern Point, consisting of about four hundred acres of land bounded easterly and southerly by the ocean, westerly by Gloucester Harbor and northerly by the Patch farm, was conveyed by the estate of Thomas Niles to trustees for an association known as the Eastern Point Association. Thomas Niles had purchased the farm in 1844. The northerly boundary line was marked by a stone wall stretching from the ocean to the harbor, and the only entrance to the Niles farm was through a gate near the harbor side. . . .

"When the Eastern Point Associates took over the property they built a gate house at the entrance near the north end of the beach, carrying the road at first through an archway under it, and later beside it. A keeper has been maintained at the lodge by the associates and their successors, and also signs declaring the road a private way and referring visitors to the lodge for permission to enter the premises. The Eastern Point property has been developed as a summer residential property and roads have been built around the point and over it in various directions. A hotel has been situated just within the gate near the beach and many houses have been erected. Until 1910 these roads all led back to the main gate which constituted the only means of ingress and egress to and from the property. In addition to a keeper at the lodge gate an officer was kept at the fork of the roads, a short distance inside the property, who attempted to regulate traffic, to forbid the use of bicycles and automobiles, and to exclude all persons who would not respect the rights of the owners of the estate as a private estate, that being the officer's understanding of the expression 'respectable' people. . . . The whole Point is sightly and picturesque, and a great many people have driven around it. . . . In addition to the maintenance of the lodge gate, signs and the attempted supervision by employees, there has been no period of twenty years within which travel over that portion of the road now in question has not been interrupted by gates, bars, fences, walls, or barriers. . . . I find that no public rights have been acquired by prescription in or over the land now of the petitioner. . . .

"There are three respondents who claim rights of way by implied grant. . . .

"In 1902 a large tract of land near the Eastern Point light house

was conveyed to one Rouse, and was accompanied by a detail plan by Aspinwall and Lincoln showing the property so conveyed with the avenues running through it as called for by the earlier plans. It also showed the Boulevard (East) as extending through the present locus as far as the fresh water pond as indicated on the prior plans. This deed contained an agreement that any road upon, or bordering upon, land thereby conveyed, shown upon said plan, and not now laid out, when laid out shall be so located that its centre lines shall correspond with the centre of the road as shown on said plan. As a matter of fact, however, as above noted, the Eastern Point Boulevard (East), then constructed on the ground to and beyond the present locus, did not correspond with the road shown as Eastern Point Boulevard (East) on said plan, or any of said plans, being nearer the sea. This Rouse deed is the only deed in the entire chain of Eastern Point conveyances which bounds on Eastern Point Boulevard (East) south of Farrington Avenue as shown on the plans running from the junction of the roads across the portion of Boulevard (East) which curves around through the golf links, or of the temporary way which has been actually built and used in place of Farrington Avenue. The owner of the Rouse land later closed that portion of the Boulevard (East) running through his land, together with Suffolk and Grove avenues, thereby diverting travel over the shore road from his immediate shore front to a detour around his land. The owner of the Rouse property has not appeared nor filed any objection in this proceeding.

"There have been a number of deeds given referring to the sectional plans, but to no sectional plan that shows the present locus. Most of the deeds of Eastern Point lands have been made with reference to detail plans . . . showing the immediate property then conveyed with the adjoining roads, the lines of such roads being carried beyond the limits of the land immediately conveyed, indicating their continuance on either side of the granted premises. None of them show the Boulevard (East) as located through the land now of the petitioner except the Rouse plan. No deeds, except the Rouse deed, have been given on any ways which are physically connected within the limits of the present locus with the road existing on the ground there over or on any ways which appear by any of the said plans to be connected within the limits

of the present locus with that portion of the Boulevard (East) shown on the plans as extending through it. . . .

"In 1910 roads were constructed at the northeasterly portion of the Eastern Point property. The road which had been built through locus in 1894 close to the shore was widened and carried on from Fort Hill Avenue at the south through locus and across the strip of beach between the pond and Brace's Cove to a connection with the temporary way which led from the junction of the roads near the lodge gate south of the golf links. It was at about this point that the Eastern Point Boulevard (East) of the plans circled around through the golf links, but as above stated, it has never been built, partly because it is not physically possible. From this point on to the Patch line a road was built known as Atlantic Avenue, taking the place in a general way of Sherman Avenue as shown on the plans, but not corresponding therewith, or leaving any lots on the ocean side. At the Patch line the wall was removed and this road connected with the Bass Rocks Road. . . .

"In February, 1917, the Trustees of the Eastern Point Company conveyed to the petitioner, referring to an Aspinwall and Lincoln detail plan, a tract of land lying southerly from and including Brace's Rocks, which form the southeast point of Brace's Cove, bounded westerly by the fresh water lake and southerly by what is shown on the lithograph plan as Lincoln Avenue. Both deed and plan refer to the Boulevard (East) at the southerly and northerly ends of the tract conveyed. The plan does not show it as extending through the premises, nor do either plan or deed refer to Ohio Avenue, but the deed provides for the construction of Lincoln Avenue from the point where it runs out of the Boulevard (East) at the southerly boundary of the premises, and the construction of a road substantially corresponding to the Lake Avenue of the recorded and lithograph plans around the easterly margin of the lake to the Boulevard (East) at the northerly boundary of the premises. These roads have been built, and the petitioner has attempted to close the portion of the shore road which was built through what is now his land in 1894 and 1910. This diverts travel along the shore of the petitioner's land from the Boulevard (East) at the south, around through Lincoln Avenue and the Lake Shore Road, to the Boulevard (East) at the northerly

end of the property where it runs between the fresh water lake and Brace's Cove.

"The respondents say that access to the ocean and to a road around the shore is an essential element in the entire Eastern Point development scheme, but it is to be noted that no actual access to the ocean is provided for, and that the Boulevard, so far as shown on the recorded or lithograph plans, is not except where it borders on a beach, a road along the shore at all, but on the contrary runs throughout its entire course in behind a tier of shore lots. The Boulevard (West) and (East) as shown on said plans is one continuous way, but not as constructed on the ground by reason of the gap through the golf links and as being located further in from the shore. The index plan was referred to in certain deeds between the trustees themselves, conveying the legal title from one set to another, but not in any deed or plan of land sold to purchasers.

"It is the contention of the petitioner that in the course of the development of the Eastern Point property and the gradual construction of roads over a period of thirty years, the trustees, by the use of sectional or detail plans only, by abstaining from a reference in any of their deeds to any plan which shows roads beyond the limits of the premises then being conveyed, by the guarded use of the lithograph plan as representing a general situation only, varying materially as to the actual location or existence of the streets thereon shown, and by express provision in some of their deeds excluding any rights in any streets other than as called for by such deeds, have avoided the creation, by either express or implied grant, of any rights of way through their remaining property, or over the premises now belonging to the petitioner. He argues that the plans at most show a road running generally around the Point and near the shore, with building lots between it and the water, and that such a road has been provided.

"None of the respondents own any land within a half mile of Brace's Rocks, and the shore road through locus is neither necessary nor convenient as a means of access from any of their land to any highway. The only deed that bounds on the Boulevard (East), except on that portion beyond the gap at the golf links, after the construction of the shore road through locus is the Rouse deed. The only other deed that can be construed as directly re-

ferring to that road is the Taft deed. Rouse, for fairly obvious reasons, makes no objection to this petition. So far as the Taft deed is concerned the evidence tends to show that his land was situated at the extreme end of the inland portion of the Boulevard (East) where its continuance to the eastward is physically broken off at the golf links, leaving him only access from the west, and that the provisions for access through Farrington Avenue or the temporary way to 'the road along the shore land at Brace's Cove known as Eastern Point Boulevard (East)' referred to that portion of the Boulevard (East) which runs along the Cove and connects with the Bass Rocks road, thereby providing access from the east. This portion of the Boulevard (East) remains untouched by the sale to the petitioner.

"The respondents show no title under either the Rouse or Taft deeds. They can only avail themselves of them if, and in so far as, they tend to show a general scheme or plan for a shore road through the property now of the petitioner of such character that the petitioner is estopped from denying its existence, and the acquirement of rights therein in the respondents by implication.

"There is no controversy in regard to the law. The difference arises in regard to its application to the facts. . . . Without attempting to review the many cases on easements implied from grants bounding on a way or from reference to plans, it seems to me that in the case at bar there have been no rights acquired by the respondents in the petitioner's land, and I so rule.

"The respondents contend that sufficient notice has not been given in this case to all parties who may have an interest. The law requires the issuance of a citation immediately upon the coming in of the examiner's report. The examiner having raised the question as to what notice should be given in this matter, it was necessary for the court to give some direction in regard to it. The law also carefully provides for other and further notice at any stage of the proceedings to any person who may then appear to have an interest or a claim to an interest. At the time of the issuance of citation it seemed to me, from such abstract of the entire record title as was then presented, that no parties other than those claiming title under deeds which bound on or refer to Eastern Point Boulevard (East) south of the fresh water lake should be cited. Since then a full report of all conveyances made

out of the Eastern Point property has been submitted, and the only other deed containing any reference to the Boulevard (East) running through locus that has been discovered is the deed to Taft above mentioned. Service of process should be made on the present owner of the Taft lot, and such service has been ordered. The respondents represent in a general way every variety of property on the Point, both geographically and under the different forms of deeds and plans adopted. If as matter of law they have no rights no one else has any rights and it would be idle to make further service. The motion is denied.

"In 1903 the Trustees of the Eastern Point Company executed an instrument by which they authorized, permitted, gave and granted to the city of Gloucester the right to lay and maintain water pipes under certain private ways at Eastern Point, viz., all ways then existing and in use through said lands, and also in or under any and all ways hereafter laid out or constructed by said company through said lands. No water pipes have in fact been laid through the shore road that was constructed through the land now of the petitioner. It is clear that the petitioner's land is subject, however, to the rights of the city under this instrument in the new Lincoln Avenue and Lake Avenue recently built. When the petitioner obstructed the shore road the city removed the obstructions. This was partly under its claim on behalf of certain citizens that there were public rights of way over it, but the city also still claims rights therein under the instrument of 1903. It seems to me that this instrument created a license which, if, and when, acted upon, would ripen into an easement. So far as the shore road through the petitioner's land is concerned, however, which was built in 1894 and widened and extended in 1910 but in which no water pipes were laid, I rule that the respondent city has no easement or other rights therein.

"The respondents have filed written requests for findings and rulings. The findings requested are covered in the foregoing statement of facts. Except as so covered they are refused. The first, second, twelfth, fourteenth and fifteenth requests for findings are specifically refused. Of the requests for rulings I grant the twelfth, thirteenth, fifteenth, seventeenth and nineteenth, and refuse the rest.

"Subject to the rights of the city of Gloucester in Lincoln and

Lake avenues under the instrument of March 12, 1903, and to the restrictions and easements in the petitioner's deed from the trustees of the Eastern Point Company, there must be a decree for the petitioner."

The first, second, twelfth, fourteenth and fifteenth requests of the respondents for findings, refused by the judge, were as follows:

"1. Eastern Point is devoted solely to seaside residential property and access to the ocean and the use of the roads along the shore is reasonably essential to the beneficial use of every estate on the Point.

"2. The nature of this territory is such that it is reasonably essential to the beneficial enjoyment of each lot within it that the owner should have a right to use the shore road."

"12. At the time of the deed to Procter of the land on Atlantic Road the only reasonably adequate road to the Gate Lodge was the shore road, including that part of it which is on the petitioner's land."

"14. For twenty-five years the Eastern Point Company has held out to prospective purchasers that there was a shore road along Brace's Cove and by Brace's Rocks, by recording a large plan showing such road and circulating among real estate dealers a similar plan.

"15. The closing of the entire shore road would be a serious damage to most of the landowners on Eastern Point and would prevent the full beneficial use of their premises."

At the request of the respondents, the judge made the following rulings of law:

"12. A grantee of land bounded on a private way belonging to the grantor and actually existing on the ground or shown on a plan referred to acquires the right to use the way in both directions so far as the grantor owns, provided it is reasonably necessary to the advantageous use of the granted premises that he should have such right.

"13. For the purposes of the rule stated in each of the last two requests it is immaterial that the name of the way may change after a certain point is reached."

"15. A grantee of land bounded on a private way belonging to the grantor and actually existing on the ground and connecting with other private ways belonging to the grantor and also existing

on the ground acquires the right to use the connecting roads so far as is reasonably necessary to the advantageous use of the granted premises."

"17. If the situation of the lands conveyed by the Eastern Point Company to the various grantees was such and the purpose of the conveyances was such that access to the ocean front must have been a material consideration in the minds of the grantees, then all of the grantees whose deeds referred to any of the recorded Foss plans acquired a right of way across Eastern Point Boulevard (East) over the petitioner's land."

"19. Grantees of the Eastern Point Company whose deeds refer to one of the small plans showing the adjacent way extending beyond their lands in either direction and open at both ends were impliedly granted rights of way in both directions and were not limited to the direction leading to the nearest public highway."

The judge refused to make the following rulings of law, asked for by the respondents:

"11. A grantee of land bounded on a private way belonging to the grantor and actually existing on the ground or shown on a plan referred to acquires the right to use the way in both directions so far as the grantor owns."

"14. For the purpose of determining the extent of rights of way impliedly granted to the purchasers of lands on Eastern Point, Eastern Point Boulevard (East) and Eastern Point Boulevard (West) are to be treated as a single road."

"16. If it was reasonably necessary to the full beneficial enjoyment of the lands on Eastern Point Boulevard or ways leading into it that the grantees should have the right to use that part of Eastern Point Boulevard (East) which is on the petitioner's land, there was an implied grant to each grantee of a right of way along the said Eastern Point Boulevard (East)."

"18. If the situation of the lands conveyed by the Eastern Point Company to the various grantees was such and the purpose of the conveyances was such that access to the ocean front must have been a material consideration in the minds of the grantees, then all of the grantees whose deeds referred to small plans of Aspinwall and Lincoln recorded therewith acquired a right of way across Eastern Point Boulevard (East) over the petitioner's land."

"20. It must be taken to have been the intention that such grantees should have a right of way in one direction to the highway leading to Gloucester and in the other direction to and along the road on the ocean front.

"21. The city of Gloucester has an easement entitling it to lay and maintain water pipes in that part of Eastern Point Boulevard (East) which crosses the petitioner's land.

"22. The clause in certain of the deeds of the Eastern Point Company that 'nothing herein contained shall be construed as conveying any rights over the remaining lands of the grantors' does not refer to rights of way over the company's roads."

To the refusals to find and rule as requested by them, and to the ruling that, subject to the rights of the city of Gloucester in Lincoln and Lake avenues under the instrument of March 12, 1903, and to the restrictions and easements in the petitioner's deed from the trustees of the Eastern Point Company, there must be a decree for the petitioner, the respondents alleged exceptions.

R. G. Dodge, (*M. F. Buckley & R. S. Wilkins* with him,) for the respondents.

H. LeB. Sampson, for the petitioner.

JENNEY, J. This case is here on the respondents' exceptions in proceedings for registration of the title to land on Eastern Point in Gloucester. The exceptions are to certain findings of fact and rulings made, all relating to easements claimed to exist over the petitioner's land. While the existence of ways public and private by prescription was in controversy, the findings of fact disposed of these contentions and no question relating thereto is now involved.

The petitioner's land in 1887 was included in the Niles farm, a tract of about four hundred acres, bounded easterly and southerly by the ocean, westerly by Gloucester Harbor, and northerly by the Patch farm. Its northerly line was then marked by a stone wall extending from ocean to harbor. Within its bounds, there was a small tract owned by the United States and used as a site for a lighthouse, and a fresh water lake of approximately thirty-six acres separated from the ocean by a barrier beach at Brace's Cove, which formed part of the easterly ocean frontage. The Niles farm did not bound on any public or private way, although a public way then terminated at a point on its northerly boundary at a gate near the harbor side, where a gate lodge was built in 1888.

Questions relating to the Niles farm were before the court in *Niles* v. *Patch*, 13 Gray, 254.

The petitioner's land consists of a little over twenty acres of upland, and bounds on Brace's Cove, the ocean, the fresh water lake, and on a line substantially parallel with the shore of the cove. The easements in controversy are in a private way claimed to exist over this land and close to the shore.

In 1887, the Niles farm was conveyed to the trustees of the Eastern Point Associates, a voluntary association. The trustees caused William H. Foss to make a plan dated March 1, 1888, which showed a division of the entire tract into lots and also "a considerable number of (unnamed) ways." One of the ways designated thereon led from the gate lodge around the entire shore front, past Brace's Cove, past the northerly end of the lake and back to a junction with the same way not far from the gate. The plan also showed a road near the ocean from the northerly end of the lake to the boundary of the Patch farm at about the point where a road to Bass Rocks was subsequently built across that farm. There was no evidence that this plan ever was recorded, referred to in any deed or used in any manner.

Under date of September 1, 1888, Foss made for the trustees a series of plans which consisted of an index plan showing an outline of the entire tract with ways substantially as on the first plan, with a division into sections, but with no division into lots, and separate plans of many sections indicated in outline on the index plan. There was no evidence that sectional plans were made of the part of the tract including the land of the petitioner. The sectional plans contained no reference to the index plan. The index and sectional plans were recorded in the registry of deeds in the same book of plans. The index plan has never been referred to in any deed except in those passing title from trustees to their successors in trust, and then only with an express statement that the reference was made for convenience. Under date of May 1, 1889, a lithographic plan was made which was substantially the same as the Foss plan of March 1, 1888. Roads and ways shown thereon were not in fact built at that time, and never have been built exactly as delineated. While the scheme as to roads has been followed in a general way, sometimes material changes have been made in locations; substitutions have been made in some

cases; and other roads never have been constructed. There was no evidence as to the origin or use of this plan, except that it appeared that it had been inserted in a booklet containing a description of the property. It was produced by the petitioner at the request of the respondents. It did not appear that the plan or booklet ever had been used in the sale of land. In the year 1892, a new lithographic plan substantially like that of 1889 was made. This was distributed to brokers, but it was not recorded, and no reference has been made to it in any deed. The judge found that "It was used as showing in a general way the location of the property, but not as showing any lots which were to be sold in accordance therewith, or as showing the streets and ways as actually constructed, or to be constructed." The evidence stated in the bill of exceptions as to the making of plans, the construction of streets and the way in which the land was divided into lots when actually sold, amply justified this finding.

There were other general plans in evidence, but they do not add to nor detract from the effect of those herein described, and they were not referred to in any deed nor used in the sale of land.

In 1889, the trustees of the Eastern Point Associates mortgaged the property, and in 1892 this mortgage was foreclosed, and the property then subject thereto was conveyed to the trustees of the Eastern Point Company.

The land has been developed as a "seaside residential property" and roads have been opened over it in various places as needed throughout a period of thirty years. The part of the way around the harbor side from the gateway to a point near the lighthouse is and has been called Eastern Point Boulevard (West), while the shore road along the easterly front is designated as Eastern Point Boulevard (East). In 1891 a rough road extending through land of the petitioner was cut through the bushes close to the shore. By 1892 this had become passable, and in 1894 the company built a good road on the same location. This road was materially nearer the shore than Eastern Point Boulevard (East) as shown on the plans. In 1910, it was widened and extended across the beach between the lake and Brace's Cove to a connection with a temporary way, which entered Eastern Point Boulevard (West) near the gate lodge. A road, known as Atlantic Road, which connected through the Patch farm with the Bass Rocks

Road, also was built. This did not closely follow any way shown on the plan. Eastern Point Boulevard (East) has never been constructed from Brace's Cove northerly and westerly of its westerly terminus except for a small section near Brace's Cove, for the reason that its construction is "impracticable because it would take a twenty foot drop" at one point.

Since 1887 when the Eastern Point Associates acquired title, there have been between seventy and eighty conveyances by said associates or their successors in title on the Eastern Point Boulevard (East) and the Eastern Point Boulevard (West) or on ways connected directly or indirectly therewith. The bill of exceptions states that "Many of these deeds referred to small plans recorded therewith which showed the lot of land conveyed, the abutters, the bounding streets, and the adjacent boulevard or street appearing as open in each direction and disclosing a small part of it beyond the property in question at both ends."

The only landowners who are here presenting exceptions to the rulings of the Land Court, and whose rights are in question, are Joseph O. Procter and others, trustees, referred to hereafter as Procter; George O. Stacy; Herbert E. Smith and Arthur W. Smith, referred to hereafter as Smith; and the city of Gloucester. Hence there is no necessity of considering what rights of way, if any, other landowners have, except so far as their existence may be pertinent to the exceptions of these respondents.

The contentions made rest in part on the claim that Eastern Point Boulevard is a single way, rather than two distinct easements. The fourteenth request for ruling was, "For the purpose of determining the extent of rights of way impliedly granted to purchasers of land on Eastern Point, Eastern Point Boulevard (East) and Eastern Point Boulevard (West) are to be treated as a single road." The refusal to make this ruling was justified by the evidence which warrants the consideration of rights in the boulevard on the basis that it consisted of two independent ways. It was so distinguished in nearly all deeds and is so shown on all plans. When not so distinguished in the deeds, the plans therein referred to designate the boulevard as east or west in the manner hereinbefore stated. The fact that the point of demarcation was not well defined does not require a contrary conclusion. This result is consistent with the thirteenth ruling made at the request

of the respondents, that a change in the name of a way after a certain point is reached is immaterial, and with the finding that they are continuous. The order for registration imports a finding of all the subsidiary facts essential to support it and consistent with the express findings. *Adams* v. *Dick*, 226 Mass. 46.

1. The Procter lots. These lots are three in number; one, situated on Atlantic Road and first conveyed in 1910, is in the extreme northeasterly corner of the entire tract and adjoins the Patch farm. Atlantic Road was not shown on any of the original plans of the entire tract, but is a way constructed in 1910 in substitution for a way shown on the plans, although not on the location of that way. The plan referred to in and recorded with the deed of this lot is one of the "small plans" hitherto described and does not show any way over the petitioner's land. The other Procter lots are on Eastern Point Boulevard (West) and were originally conveyed by deeds given in 1888 and 1890. These deeds described the lots as being on a plan of section J of land of the Eastern Point Associates, but that section did not include any part of the petitioner's land nor show any ways thereover.

The principle governing the rights of grantees of lots, bounded on a way shown on a plan was established by *Regan* v. *Boston Gas Light Co.* 137 Mass. 37, and *Pearson* v. *Allen*, 151 Mass. 79, which declared that, in the absence of an express grant, where large tracts of land were plotted into numerous lots bounded on many different ways, a "grant by implication of an onerous servitude upon other land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless such is clearly the intention of the parties;" that a reference to a plan in a deed, although accompanied by its use for description or bounds, does not result in the conveyance of rights not necessary for the enjoyment of the premises, in the absence of an intent appearing to that effect; that the only necessity contemplated in ordinary cases is that of access to public highways; and that the great desirability of a way for purposes of prospect, is not a sufficient reason to extend or modify the general rule.

In determining the intent, the entire situation at the time the deeds were given must be considered. For example, whether the ways in question merely existed on paper, or were then constructed on the ground; whether they were then actually used

as appurtenant to the granted premises; or whether they were remote or in close proximity. The doctrine of *Regan* v. *Boston Gas Light Co. supra*, and *Pearson* v. *Allen, supra*, is not limited nor impaired by *Boland* v. *St. John's Schools*, 163 Mass. 229, *New England Structural Co.* v. *Everett Distilling Co.* 189 Mass. 145, *Downey* v. *H. P. Hood & Sons*, 203 Mass. 4, and *Ralph* v. *Clifford*, 224 Mass. 58. See also *Drew* v. *Wiswall*, 183 Mass. 554, and *Stevens* v. *Young*, 233 Mass. 304.

Where land is bounded on an existing way not defined by plan referred to in the deed, the same considerations govern. An implied grant of way is limited to that necessary for the enjoyment of the premises; and the clear intent of the parties governs. It frequently has been said that there arises by estoppel, which is the basis of the doctrine of implied grant, a right to use a way for its entire length. *Downey* v. *H. P. Hood & Sons, supra*, and cases cited. It is not now necessary to consider whether there may not be some limitation to this broad proposition, for example, where the way is of considerable length, and does not at its distant end connect directly or indirectly with a public way.

Applying these rules to the ways claimed as appurtenant to the Procter lots, it is clear from the findings of the judge that no way over the petitioner's land was necessary for access to any public way. No such way is shown on the plans referred to in the deed of these lots, and the lots do not abut on any way shown on any plan as crossing said land, or on any way actually existing thereover. Hence it is clear that there is no right of way over the locus as appurtenant to the Procter lands.

The ways shown on the plans, and as constructed, did not provide for actual access to the ocean; and except where they bordered on beaches, the boulevards were behind tiers of shore lots. Where they were behind beaches, except on Eastern Point Boulevard (West), there was a strip of land between the way and high water mark. It is argued that the index plan, with which is recorded the detailed plans of some of the sections shown thereon, ties the plans together, so that although in fact distinct, they must be considered as one. The language used in the deeds does not state nor imply that they are to be so treated. The fact that they relate to distinct parts of one large tract, and may be fitted together, does not render them one in legal effect. Moreover, there is no

sectional plan showing the petitioner's land. An index plan of the nature and use described does not create nor enlarge easements, when not referred to for that purpose in the deeds under which title is claimed.

2. The Stacy lots, five in number. These, situated in sections I and J on the index plan, are between the fresh water lake and Gloucester Harbor, and all are on Eastern Point Boulevard (West). They also abut upon other streets in which no rights of way are in controversy under the exceptions. The plans referred to in the deeds and recorded therewith are "small plans" as hereinbefore described, and they do not show the land of the petitioner, nor indicate the existence of any way over the same. The deed contained the following provision: "All said parcels of land are conveyed together with the right to use the streets on which said lots are bounded in common with others entitled to use the same so far as said streets are now open or may hereafter be opened." The rights of way appurtenant to these lots being defined by the deed, no implied easement can arise. Since it has been determined that Eastern Point Boulevard (East) and Eastern Point Boulevard (West) are in legal effect distinct ways, no easement was created over the petitioner's land, as the Stacy lots did not bound on any way in controversy extending thereover.

3. The Smith lot, an interior parcel situated on Farrington, St. Louis and Kenwood avenues, was originally conveyed to Laura Smith. The deed to her, dated April 8, 1910, referred to a "small plan" showing no ways over the petitioner's land. There was no express grant of a right of way. The land did not bound on any existing way near or over the petitioner's land; and under the findings of the judge, no way thereover was necessary for access to the granted premises. Clearly there was no implied grant of a right over the petitioner's land as appurtenant to this lot.

No question of the existence of ways by dedication is involved. Dedication implies public rights only. Since St. 1846, c. 203, § 1 (now R. L. c. 48, § 98), no public way can be so created. *Hayden* v. *Stone*, 112 Mass. 346. *Commonwealth* v. *Coupe*, 128 Mass. 63. *McKenna* v. *Boston*, 131 Mass. 143. *Attorney General* v. *Onset Bay Grove Association*, 221 Mass. 342, 347, 348, 350. See *Hinckley* v. *Hastings*, 2 Pick. 163, 164, note, and cases collected in 18 C. J.

38. Therefore the respondents get nothing by reference to deeds of other lots. Even if it be assumed that the deeds of the Taft and Rouse parcels gave the grantees rights of way over the locus which those grantees, who are still the owners, do not appear to maintain, the respondents are not aided.

The cases as to dedication of land for public landings, shore fronts, beaches, parks, squares and for light, air and prospect do not apply, as no such question is involved. See *Attorney General* v. *Tarr*, 148 Mass. 309; *Attorney General* v. *Vineyard Grove Co.* 181 Mass. 507; and *Attorney General* v. *Onset Bay Grove Association*, *supra*.

4. The city of Gloucester. On March 12, 1903, the trustees of the Eastern Point Company in consideration of $1 and other valuable considerations executed and delivered to the city of Gloucester an instrument in the form of deed, duly acknowledged and recorded, in which they "authorize, permit, give and grant to the said City of Gloucester the right to lay, relay and maintain water pipes and place hydrants for the purpose of conveying and using water in or under certain private ways owned by us and situated in the said lands at Eastern Point in said Gloucester, viz: all ways now existing and in use through said lands, and also in or under any and all ways which may hereafter be laid out or constructed by said Company or its Trustees through said lands." No water pipes have been laid by the city under the terms of this deed. When it was given, a way was in existence and in use over land now owned by the petitioner, as already stated. Since the petitioner has taken title, he has built a new way under the requirements of his deed on the location of Lincoln Avenue and in continuation thereof; and he also has constructed a way along his westerly boundary near the fresh water lake and substantially in the location of Lake Avenue as shown on the general plans.

The judge ruled without any exception by either the petitioner or the respondents that the petitioner's land is subject to the rights of the city of Gloucester, under the instrument hereinbefore referred to, in Lincoln and Lake avenues, and no question as to the correctness of this ruling is before the court. He further ruled that the city had no easement or other rights in the road which had been built through the petitioner's land and near the shore, because he interpreted the instrument as creating a license "which

if, and when, acted upon would ripen into an easement." We think that this ruling was wrong, and that the exception thereto must be sustained. See *Gray* v. *Cambridge*, 189 Mass. 405.

This instrument gave to the city for the purposes defined therein an easement in the ways then in existence and in use. Its effect as to ways which might thereafter "be laid out or constructed" by the grantors or their successors in trust is not now considered.

The petitioner's claim, that the grant to the city is invalid for the reason that it refers to ways to be laid out and constructed by the trustees, can now be disposed of. He contends that it recognizes the existence of ways over land in which the dominant estate is in the same owner. However, it is well settled that for the purposes of description, exception or grant, either express or implied, a way as actually worked and used may be referred to in the creation of rights in land. See *Gorton Pew Fisheries Co.* v. *Tolman*, 210 Mass. 402, at pages 408, 409, 411.

The refusal to make the specific findings of facts requested was not the subject of exception. *Puffer Manuf. Co.* v. *Yeager*, 230 Mass. 557.

The respondents, having had full opportunity to be heard, are not aggrieved by the refusal of the judge to give further notice to others, who did not appear in the Land Court. Their rights were not affected thereby.

The exceptions not specifically described, all of which relate to requests for rulings, have been examined with care. They are disposed of by the considerations herein stated, or by the findings of the judge, and need not be considered separately. We find no error in their refusal. All of the exceptions aside from that relating to the rights of the city of Gloucester are overruled, and its exception relating solely to the right to lay, relay and maintain water pipes and place hydrants is sustained.

So ordered.

FLORENCE E. KENNON *vs.* HARVEY N. SHEPARD, trustee.

Suffolk. March 2, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, In writing, Construction. *Landlord and Tenant*, Construction of lease. *Practice, Civil*, Report. *Words*, "Him."

At the opening of the trial of an action upon a lease in writing by the lessee against the lessor, the plaintiff read the pleadings to the jury and offered the lease in evidence. The declaration contained an allegation that the defendant failed to perform a covenant on his part to provide heat for the premises. The lease, while providing that the lessor should provide heat, contained a provision that the lessor should be without liability "for the stopping thereof." The defendant, after the reading of the lease, moved that a verdict be ordered in his favor. The judge granted the motion and reported the case to this court for determination "upon the pleadings and upon the written lease, with the agreement of counsel that" this court should "make such disposition of the case as the law and facts warrant." It did not appear that any offer of proof was made relating to a construction of the provisions of the lease. *Held*, that it was not open to the plaintiff to contend that he should have been permitted to offer evidence showing what construction the parties to the lease by their conduct had placed upon the provision as to heating.

The first draft of a lease in writing contained a provision, immediately following the description of the premises, reading, "Including the heating of the said premises, and the use of the elevators in common with others, so far as the same may be run by the said lessor, but without any liability to him therefor, and without abatement of rent for the stopping thereof." Before the instrument was executed, the words "and the use of the elevators in common with others" were stricken out. In an action by the lessee against the lessor for damages resulting from a failure to supply heat, it was *held*, that

(1) The words stricken from the contract before its execution could not be restored and could not be used in its construction;

(2) The fair import of the words used was that, while the lessor promised to heat the premises, he was to be under no liability in case he failed to do so;

(3) No rule of law prevented the making of such an agreement;

(4) The word "him" in the clause, "without liability to him," referred to the lessee.

CONTRACT by the assignee of one David H. Cohen, the lessee named in a lease by the defendant of the premises numbered 997 on Washington Street in Boston, the declaration alleging "that the defendant failed to perform the terms, conditions and covenants on his part to be performed and failed to provide heat for the said premises, which under the terms of the said lease he was

bound to provide, in consequence of which the said Cohen was unable to habitate and carry on his said business during the fall of 1917 and the winter months at the end of 1917 and the early winter months of 1918." Writ dated April 20, 1918.

In the Superior Court the action was tried before *Morton*, J. The record states: "The pleadings were read to the jury, and the lease offered in evidence, whereupon the defendant requested that a verdict be ordered for the defendant." The judge granted the motion and ordered a verdict for the defendant "upon the ground that the defendant by the terms of the written lease had exempted himself from liability for failure to heat," and reported the action to this court "upon the pleadings and upon the written lease, with the agreement of counsel that" this court should "make such disposition of the case as the law and facts warrant."

J. J. O'Connor, for the plaintiff.

M. A. Scanlon, for the defendant.

JENNEY, J. The plaintiff seeks to recover damages for failure to heat premises occupied by him as lessee of the defendant. The lease, as originally drafted, contained the following words inserted immediately after the description of the demised premises: "Including the heating of the said premises, and the use of the elevators in common with others, so far as the same may be run by the said lessor, but without any liability to him therefor, and without abatement of rent for the stopping thereof." The words "and the use of the elevators in common with others" were stricken out before signing by a line drawn through them, and the lease as so modified was then executed. It was agreed at the argument that the lease was in force during the time involved in this action, because of a provision as to its continuance from year to year, which is not printed in the report. The case is considered on this basis.

The plaintiff contends that the instrument must be construed as creating an unqualified obligation to heat the leased premises; and that if it cannot be so considered on its face, evidence should have been admitted showing the construction of this provision by the parties.

The latter contention may be disposed of shortly. No offer of proof was made, and it does not appear, and cannot be assumed, that the judge did not permit the plaintiff to present for considera-

tion any evidence properly bearing on the question of the construction of the lease. *Warren* v. *Spencer Water Co.* 143 Mass. 155. *Cook* v. *Enterprise Transportation Co.* 197 Mass. 7.

The words eliminated from the contract before its execution cannot be restored; and they cannot be used in its construction. See *Straub* v. *Screven,* 19 S. C. 445; *Watson* v. *Paschall,* 93 S. C. 537. There is no right to strike out a material term from a contract in order to uphold it. It is well settled that where there are inconsistent provisions, the one requiring something to be done may be given greater consideration than the other which defeats a full performance; and that while repugnant words may sometimes be rejected, such a result is only to effectuate the evident purpose of the entire instrument, and such words are not to be considered immaterial where they are susceptible of a construction which is consistent with the rest of the contract and which gives effect to all of its terms. *Morrill & Whiton Construction Co.* v. *Boston,* 186 Mass. 217. *Ferguson* v. *Union Mutual Life Ins. Co.* 187 Mass. 8. The fair import of the words used is that, while the lessor promised to heat the premises, there was to be no liability in case he failed to do so. The subject is included in one short sentence. The limitation was not an attempt to defeat the entire lease, but only liability which might otherwise have arisen from one of its terms.

No rule of law prevents the making of such a contract. *Furnivall* v. *Coombes,* 5 M. & G. 736, *Williams* v. *Hathaway,* 6 Ch. D. 544, and *Watling* v. *Lewis,* [1911] 1 Ch. 414, are not in accord with our decisions. These cases decide that words destroying the personal obligation of a contract are to have no effect, and are to be disregarded. See also *Vickers* v. *Electrozone Commercial Co.* 38 Vroom, 665. They are inconsistent with our decisions holding that a party to a contract may limit his personal responsibility. See *Carr* v. *Leahy,* 217 Mass. 438, and cases cited.

The word "him" in the clause "without any liability to him" evidently refers to the lessee, as it is used in connection with the definition of his rights under the lease. *Greenough* v. *Phoenix Ins. Co. of Hartford,* 206 Mass. 247. *Goodman* v. *Telfer,* 230 Mass. 157.

It follows that the verdict for the defendant was directed rightly, and that judgment must be entered thereon; and it is

So ordered.

NEW ENGLAND COCA COLA BOTTLING COMPANY *vs.* GALLAGHER BOTTLE CAPPING MACHINERY COMPANY, INCORPORATED.

Suffolk. March 3, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Practice, Civil, Exceptions, Findings by judge, Requests and rulings.

An exception to a finding of fact by a judge, who heard an action at law without a jury, must be overruled if the finding is supported by any foundation in evidence.

An exception to a refusal by a judge, hearing an action at law without a jury, to grant a request for a ruling must be overruled if the ruling is not applicable to facts warrantably found by the judge.

An exception by a defendant in an action of contract, with a declaration in two counts, to a denial by a judge, who heard the action without a jury, of a motion, urged by the defendant before any evidence had been introduced, that the plaintiff be required to elect between the first count, to maintain which the plaintiff would have had to prove that he was a salesman for the defendant of certain goods, and the second count, which was based upon an agreement by the defendant to sell the goods to the plaintiff, must be overruled where the judge, after hearing the case, found, upon evidence warranting the finding, that the plaintiff was not a salesman for the defendant and that the defendant had agreed to sell the goods to the plaintiff and had broken the agreement.

CONTRACT, with a declaration as amended in two counts, the first count being for $746 upon an account annexed with fifteen items of "commission . . . on machines," and "overcharge on . . . machines," and the second count being for damages resulting from a failure of the defendant to deliver to the plaintiff thirteen of twenty "improved soda filling and capping machines with a crank gear attachment," which, the plaintiff alleged, it had bought of the defendant. Writ dated May 6, 1918.

In the Superior Court the action was heard by *Sisk*, J., without a jury. Before any evidence was introduced, the defendant in writing moved that the plaintiff be required to elect between the counts. The motion was denied. Upon all the evidence, the judge found that the plaintiff was not a salesman for the defendant. Other material facts found by him and exceptions saved by the defendant are described in the opinion. There was a find-

ing for the plaintiff in the sum of $752.77; and the defendant alleged exceptions.

F. J. Muldoon, for the defendant.

P. M. Lewis, for the plaintiff.

JENNEY, J. On the voluminous record, consisting mainly of correspondence but including some slight oral evidence, the judge of the Superior Court, who tried the case without a jury, found that "the parties entered into a contract for the purchase and sale of 20 improved soda filling and [bottle] capping machines;" that "the plaintiff furnished the defendant with orders and shipping instructions . . . within a reasonable time after the contract was made;" and that the defendant broke its contract by failing to fill orders except at an increased price. He found for the plaintiff in the sum of $752.77. No question as to amount is involved.

The findings must stand if supported by any foundation in evidence. *Bangs* v. *Farr*, 209 Mass. 339. *Evans* v. *County of Middlesex*, 209 Mass. 474. The letters although loosely phrased, and admitting of different deductions, warranted, but did not require, the findings of facts on which liability was based. They are well summarized in the carefully drawn decision of the judge.

Of the defendant's exceptions, those to requests numbered two and three are expressly waived. The remaining requests now in controversy were either inapplicable because of the judge's findings, or inconsistent therewith, and were properly refused.

Exceptions overruled.

ADA F. NEEL *vs.* HOWARD W. LANG & another.

Suffolk. March 5, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, Mistake. *Deed*, Revenue stamp.

The owner of certain real estate in Harwich, who lived in the State of New Jersey, wrote to her sister in Harwich to tell a neighbor that she would sell the real estate for $6,000. The sister offered the property for that price and later understood that the offer was accepted. No agreement nor memorandum in writing preceding conveyance was made. A deed was executed by the owner convey-

ing the real estate to the neighbor and reciting the consideration as "one dollar and other valuable considerations." The owner's sister, the neighbor and the neighbor's attorney met at the proper registry of deeds, the owner's sister attending without an attorney on the advice of the neighbor's husband; and the sister presented the deed. It then bore no revenue stamps such as were required by U. S. St. 1917, c. 63. The neighbor's attorney informed the owner's sister that stamps were required and affixed $3 in stamps, which would have been required by a consideration price of $3,000. He did not tell the owner's sister, nor did she know, that $1 in stamps was required for each $1,000 of consideration. The stamps were paid for and were cancelled by the owner's sister in her behalf. The deed then was delivered, the consideration to be paid later. The neighbor came to believe, through some lapse of memory or misunderstanding for which the owner's sister was not responsible, that the price was $3,000, refused to pay $6,000, and refused to reconvey the property. In a suit in equity by the owner for a cancellation of her deed and a reconveyance of the property, the facts as above recited were found by the judge and a decree was ordered for the plaintiff. Upon exceptions by the defendant, it was *held*, that

(1) There was no meeting of minds and no completed contract and that the plaintiff was entitled to relief;

(2) There was no negligence of the plaintiff or of her sister to justify the defendant in supposing that the plaintiff assented to a sale for a consideration of $3,000;

(3) Owing to the fact that neither the plaintiff nor her sister was responsible for the error of the defendant, the questions, whether the sister exceeded her authority in delivering the deed without payment of the consideration price, and whether and how far the plaintiff was bound by her act in so doing, were immaterial;

(4) The paying for and cancelling of revenue stamps denoting a consideration price of $3,000 under the circumstances did not preclude the plaintiff from relief.

BILL IN EQUITY, filed in the Superior Court on January 23, 1919, against Howard W. Lang and Maude Brewer Lang, his wife, alleging in substance that the plaintiff had conveyed certain premises in Harwich to the defendant Maude Brewer Lang, understanding that the defendant was to pay $6,000 therefor, and that the defendant had understood that the purchase price was $3,000. The prayers of the bill were that the deed be declared void, that the defendants be required to reconvey the premises to the plaintiff and for further relief.

In the Superior Court, the suit was heard by *Fox*, J. The defendants asked for the following rulings:

"1. Upon all the evidence, the plaintiff is not entitled to relief in equity.

"2. If the plaintiff executed the deed in question without a recital of the real or specific consideration and delivered the deed

to her sister for the purpose of completing the transaction by delivery to the grantee or otherwise, the plaintiff is bound by the acts or failure to act of her sister.

"3. If the plaintiff gave the deed in question to her sister for the purpose of completing the transaction between the parties, to wit: the plaintiff and the defendant Maude Brewer Lang, and the sister in either affixing or cancelling the revenue stamps upon the deed failed to affix or cancel the number or value of stamps required by the laws of the United States for a deed with the consideration claimed by the plaintiff, the plaintiff, being not excused by ignorance of the United States law, cannot avail herself as against the defendant Maude Brewer Lang of an alleged mistake as to the amount of that consideration.

"4. The plaintiff will not be given relief in equity against a mistake induced by her own negligence or that of her sister.

"5. Where the mistake against which relief in equity is sought arises out of a want of diligence called for by the express provisions of United States statutes, equity will not grant relief.

"6. If the consideration for the deed in question was as claimed by the plaintiff, $6,000, the provisions of the United States statutes called for the affixing and cancellation of stamps to the amount or value of $6 and not $3, and the failure of the plaintiff or her agent to affix and cancel the former amount is such a want of care or lack of vigilance on her part as to prevent her securing relief in equity against a mistake as to the consideration of the deed.

"7. Whatever authority the plaintiff may have conferred upon her sister with reference to making a trade for the land in question, if the plaintiff gave to her sister a deed of the property in question for the purpose of completing a transaction between the parties named in the deed, the acts of the sister in so completing the transaction, including the affixing and cancellation of the necessary revenue stamps, were the acts of the plaintiff.

"8. Wholly apart from any prior transactions, the delivery of a deed with revenue stamps affixed and cancelled indicating a consideration of $3,000, and the acceptance of such a deed by the defendant either through herself or her husband as agent, create or make a binding contract between the parties."

Of the foregoing requests, the judge denied those numbered

1, 2, 3, 5, 6 and 8; as to request numbered 4, found that there was "no negligence," and ruled that the request numbered 7 was immaterial.

The judge filed the following memorandum of findings and rulings:

"Gertrude Smith had authority from her sister, Mrs. Neel, to offer Sunnywood to the Langs for $6,000, and for no other price. She offered it for $6,000 and for no other price, and understood, later, that the offer was accepted. Because of the intimate relations between Miss Smith and the Langs, who were neighbors, no written agreement was ever made, and no writing of any sort passed between the parties until the deed had been delivered. The deed recited the consideration to be 'one dollar and other valuable considerations.'

"Miss Smith, Mrs. Lang and Mrs. Lang's attorney met by appointment at the registry of deeds November 22, 1918. The deed, when presented by Miss Smith, bore no stamps. Mrs. Lang's attorney informed Miss Smith that stamps were required, and affixed three one dollar stamps. Miss Smith paid for the stamps and cancelled them. The attorney did not tell her, and she did not know, that a dollar stamp was required for each $1,000 of consideration.

"Immediately after the delivery of the deed, Mrs Lang asked Miss Smith what she was to pay for the land, and Miss Smith said: 'Six thousand dollars, of which $500 has already been received.' To this statement, Mrs. Lang made no reply, and made no effort to keep the deed from the record. The next day, Miss Smith handed Mrs. Lang a memorandum as follows:

". . . Sold to Maude Brewer Lang house and land $6000.00 six thousand dollars (five hundred paid acc.)

[Signed] Gertrude Smith,
For Frances Neel."

"Mrs. Lang took this memorandum but made no comment, and no reply was made until two days later when Mr. Lang wrote, saying that he understood the price to be $3,000. Then Miss Smith wrote, proposing that the deal should be called off. The defendants refused to reconvey, and hence this bill.

"On the assumption most favorable to the defendants, they

came to believe, through some lapse of memory, or misunderstanding, — for which Miss Smith was not responsible, — that the price was in fact $3,000; on that assumption it is clear that there never was any meeting of the minds, and that a reconveyance should be ordered, with costs.

"Decree accordingly."

The defendants alleged exceptions.

Pertinent federal statutory provisions relating to revenue stamps, in force at the time the deed was delivered, were (U. S. St. 1917, c. 63, § 802):

"That whoever — (a) Makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being duly paid; . . . Is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than $100 for each offense;" and (Schedule A, paragraph 7 of the same statute) "Stamp Taxes . . . Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof 50 cents."

E. C. Stone, for the defendants.

J. L. Hall, for the plaintiff.

CARROLL, J. The plaintiff, a resident of New Jersey, wrote her sister, Gertrude A. Smith, at Harwich, "Tell Mrs. Brewer I would sell Sunnywood [certain real estate in Harwich owned by the plaintiff] for $6,000.00." Mrs. Brewer is the mother of the defendant Maude B. Lang. There was evidence that Miss Smith informed Mrs. Lang of this offer, and she replied, "I will tell mother;" and that later she gave Miss Smith a check for $500 "to clinch the bargain." A deed reciting the consideration to be one dollar and other valuable considerations, was prepared and sent to the plaintiff, and after being signed by her was returned to Miss Smith. On November 22, 1918, Miss Smith, Mrs. Lang

and the defendants' attorney met at the registry of deeds in Barnstable. Three one dollar stamps were affixed to the deed by the attorney; they were cancelled by Miss Smith and the deed was delivered to Mrs. Lang. Afterwards Miss Smith gave Mrs. Lang a memorandum of sale reciting that the price was $6,000.

On November 25, the defendant Howard W. Lang wrote Miss Smith saying that Mrs. Lang had shown him the memorandum of sale and that it caused him much surprise, as he understood the price was $3,000; that fearing he had made an error, he talked with Mrs. Brewer and she understood the price was $3,000. To this letter Miss Smith replied, denying that $3,000 was the price and asserting that the only proposal ever made was for $6,000; she offered to return the $500 and asked for a reconveyance of the property. There was testimony by the defendants that the price named was $3,000. The judge of the Superior Court found that Miss Smith was authorized to sell the real estate for $6,000 and at no other figure; that she understood this offer was accepted; that she did not know "a dollar stamp was required for each $1,000 of consideration," and that "through some lapse of memory, or misunderstanding . . . [the defendants believed] the price was in fact $3,000."

If the plaintiff offered to sell the real estate for $6,000 and this offer was misunderstood by the defendants, they supposing the price to be $3,000, and under this misunderstanding the deed was executed and delivered, then the parties did not assent to the same contract. There was no completed contract; it had no real existence, and the plaintiff is entitled to relief. "It is an elementary principle of the law of contracts that, if one party thinks he is buying one thing and the other party thinks he is selling another thing, there is no meeting of minds on the subject matter of the sale. When there is no agreement as to the identity of the subject matter of the contract there can be no contract." *Dzuris* v. *Pierce*, 216 Mass. 132, 135. This principle is applicable in the case at bar. *Estey Organ Co.* v. *Lehman*, 132 Wis. 144. *Wilkinson* v. *Williamson*, 76 Ala. 163. *Rovegno* v. *Defferari*, 40 Cal. 459. *Rupley* v. *Daggett*, 74 Ill. 351. *Rowland* v. *New York, New Haven, & Hartford Railroad*, 61 Conn. 103.

The defendants contend that an error in the price to be paid is not such a misunderstanding concerning the subject matter of

the contract as will prevent the mutual assent of the parties. The price for which the premises were to be sold was a matter of substance and was a material element of the agreement. *Rovegno* v. *Defferari, supra. Rupley* v. *Daggett, supra.* In *Hecht* v. *Batcheller*, 147 Mass. 335, relied on by the defendants, the plaintiffs and the defendants believed the makers of a note sold were solvent, whereas they were in fact insolvent. It was held that there was no mistake about the identity of the note, as it was the same note which was bought and sold; that the misapprehension affected, not its identity but its value, and that a mistake as to the value or quality or other collateral attributes, would not prevent the plaintiffs from recovering. In the case at bar there was no misunderstanding relative merely to the value or quality or other attributes of the property. There was an entire absence of any agreement. The only offer the plaintiff made was to sell at $6,000; it was not accepted and the misunderstanding of the defendants that the price was $3,000 prevented the mutual assent necessary to the contract.

There was no negligence of the plaintiff to justify the defendants in supposing that she assented to the sale for the consideration of $3,000. The judge found that she was not responsible for the defendants' misunderstanding and that there was no negligence on her part. Her agent and the defendants were neighbors and were on terms of friendly intimacy. The advice of the defendant Howard W. Lang had been sought by her on business matters. On his advice she discharged the attorney who drew the deed and who was acting for her. The defendants' attorney was present when the deed was delivered. He provided the stamps and affixed them to the deed. Miss Smith was not at this time asked concerning the consideration and she did not know what revenue stamps were necessary; and the only price mentioned by her, at which her sister would sell, was $6,000. On these facts it could not be ruled that as matter of law the plaintiff was guilty of such negligence as to preclude her from the relief sought. *Shapira* v. *Wildey Savings Bank*, 213 Mass. 498. *Arnold* v. *Teel*, 182 Mass. 1.

The defendants requested rulings based on the assumption that the plaintiff was bound by the act of her agent in delivering her deed for the purpose of completing the transaction. As the agent was not responsible for the defendants' error regarding the price

for which the property was offered for sale, it is unnecessary to discuss the question of the extent of her power or whether the plaintiff would be bound if the agent did, in fact, go beyond her authority. See *Lovett, Hart & Phipps Co.* v. *Sullivan*, 189 Mass. 535.

The defendants claimed that the consideration as shown by the stamps affixed was $3,000, and requested the judge to rule that the delivery of the deed created a binding contract. So far as the plaintiff's right to relief is concerned, under the circumstances shown the affixing and cancellation of the revenue stamps did not preclude her from relief. They were affixed by the defendants' attorney, and Miss Smith relied on him. Although she paid for the stamps as directed, she was not told that a dollar stamp was required for each $1,000 of consideration, and was ignorant of the fact. The requests based on this incident were refused rightly. On the question of the effect of failure to attach revenue stamps to a written instrument, see *Rowe* v. *Bowman*, 183 Mass. 488.

A decree directing a reconveyance with costs was properly ordered.

Exceptions overruled.

ELIOTT F. TRULL & another, trustees, *vs.* ARTHUR P. TARBELL & others.

Middlesex. March 8, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Trust, Construction. *Devise and Legacy*, "Heirs at law," Time of vesting. *Words*, "Heirs at law."

A testator, who had three children, a daughter twenty-five, a son twenty-three and a daughter fifteen years of age respectively, made a will placing the residue of his estate in trust, a certain annuity to be paid from the income to his widow and the balance of the income to be paid to his children or their children during the life of the widow. The will then contained three paragraphs, each referring to one of the testator's three children and providing that, after the death of the widow, one third of the income was to be paid to that child during his life and, after such child's death "leaving children or grandchildren," one third of the principal was to be conveyed and distributed "to and among

the children and grandchildren . . . and in case no such children or grandchildren" survived such child of the testator, that child's share of the income was to be paid for life to the other two children of the testator "during the term of their respective natural lives and the life of the survivor of them in case either dies leaving no children or grandchildren; and in case either [of such other two children of the testator] . . . or both . . . have died leaving children or grandchildren" the trustees were directed "to pay over, convey and distribute among their respective children and grandchildren as they claim by right of representation the share of the principal estate or trust property which would have fallen to the children of" the child to whom the paragraph of the will referred, had that child died leaving children; and in case that child "shall survive both my other children then upon his decease leaving no children or grandchildren I direct my trustees to pay over, convey and distribute all said trust estate as it would legally descend to and among my heirs at law the children and grandchildren taking the portion that would have fallen to their respective parents." Each of the three children survived their mother and then died, leaving no children nor grandchildren surviving, the first to die being the brother, who left a will which, in the events which happened, gave his property to his younger sister, the older sister next dying intestate and the last to die being the younger sister, who left a will. *Held*, that

(1) Under the provisions of the trust, the interest in the trust property in remainder after the life interests vested at the death of the testator;

(2) In the events which happened, that interest vested in those who were the testator's "heirs at law" at the time of his death, descended to the survivor of his children and was subject to the provisions of that child's will.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 3, 1919, by the trustees under the will of Ezra Trull, for instructions.

By the will, the residue of the testator's estate, "real personal and mixed of every kind and description whatever" was given to the predecessors of the plaintiffs in trust, to pay from the income $6,000 annually to the testator's wife during her life and the balance to his three children, Mary F. Trull, Ezra J. Trull and Annette F. Trull during their lives, provision being made for the contingency (which did not happen) of the death of any of the children during the lifetime of their mother. There then followed three paragraphs, one as to each child, alike except for the names of the children. The paragraph as to Ezra J. Trull was as follows: "I direct my said trustees their survivor or successors from and after the decease of my said wife to pay over to my son Ezra J. Trull one third part of the net income of all the property they may then hold in trust under this my will as said income shall accrue in equal quarter-yearly instalments for and during the term of his

natural life, and from and after the decease of my said son, leaving children or grandchildren, my said wife having deceased I direct my trustees their survivor or successors to pay over, convey and distribute one third part of the principal sum or estate or trust property held by them by this my will to and among the children and grandchildren in equal shares of my said son such grandchildren taking the portion that would have fallen to their parent if alive, and in case no such children or grandchildren of my said son shall survive him then I direct my said trustees for the time being to pay over to my daughters Mary F. and Annette F. to be divided equally between them the net income that would have gone to my son during the term of their respective natural lives and the life of the survivor of them in case either dies leaving no children or grandchildren; and in case either or both of my daughters have died leaving children or grandchildren then I direct my trustees to pay over, convey and distribute among their respective children and grandchildren, as they claim by right of representation, the share of the principal estate or trust property which would have fallen to the children of my son had he died leaving children; and in case my son shall survive both my other children then upon his decease leaving no children or grandchildren I direct my trustees to pay over, convey and distribute all said trust estate as it would legally descend to and among my heirs at law the children and grandchildren taking the portion that would have fallen to their respective parents."

Ezra J. Trull and Mary F. Trull survived their mother and died without issue surviving, the former leaving the will described in the opinion, and the latter intestate. Annette F. Trull married one Jacob Hittinger and, after the deaths of her mother and of her brother and sister, died testate without issue, leaving her husband surviving her. The prayer of the bill was for instructions, "To what persons and in what proportion" the trustees should "convey the trust property."

The defendants are in two groups: Arthur P. Tarbell, Evelyn T. Bates, Charles E. Trull, Horace Trull, Eliott F. Trull, Bertha P. Trull and Clifford Trull contended that, as persons who would have been the "heirs at law" of Ezra Trull if he had died at the time of the death of his daughter Annette, they were entitled to the trust estate. Jacob Hittinger, husband of the testator's

daughter Annette, and Theodore Eaton, Esquire, the administrator with the will annexed of her estate, contended that the remainder in the trust property after the interests for life created by the will vested at the time of the death of the testator in his three children and descended to Annette by the previous deaths without issue of her brother and her sister, the provisions of the will of her brother, which are described in the opinion, and the intestacy of her sister.

Other material facts appearing in the pleadings are described in the opinion.

The suit was reserved by *Crosby*, J., upon the pleadings for determination by the full court.

G. H. Brown, for the plaintiffs, stated the case.

R. F. Tift, for the defendants Arthur P. Tarbell and others.

G. C. Scott, for the defendants Theodore Eaton, administrator with the will annexed of Annette F. Hittinger, and Jacob Hittinger, principal beneficiary under her will.

JENNEY, J. This is a bill in equity by the trustees under the will of Ezra Trull, for instructions concerning the disposition of the property held in trust.

Ezra Trull died on March 8, 1869, leaving a will dated January 6, 1866. When the will was made, he was married and had three unmarried children, the issue of the marriage, Mary F., Ezra J. and Annette F. Trull, aged respectively twenty-five, twenty-three and fifteen years. His wife and children all survived him. Annette C. Trull, his widow, died on November 21, 1876.

Ezra J. Trull married on June 3, 1869, and died testate on April 29, 1886, leaving a widow but no issue. Under his will the income of the residue of his estate was given to trustees for the benefit of his wife, and upon her death in 1913, the trust terminated, and his "heirs at law then living" became entitled to the property.

Mary F. Trull married John W. Swords on December 18, 1872, and died intestate January 27, 1903, leaving neither issue nor husband.

Annette F. Trull married Jacob Hittinger in October, 1898, and died without issue on August 26, 1919, her husband surviving her. Her will contained the following provision: "I give, bequeath and devise to my husband, Jacob Hittinger of Belmont,

Massachusetts, all my estate, both real and personal, of every kind and nature, which I may own at the time of my decease, to have and to hold the same and enjoy the use and income thereof during his life, together with the right to use any part or the whole of the principal of my estate, in whole or in part, for such purposes and in such amount as he in his sole uncontrolled discretion shall deem advisable. I believe that my husband will use only the income from the property which I shall leave, but I impose no restraint of any kind whatever on his use of the whole of my estate, both principal and income, if he desires to do so.

"I desire my husband to keep my property separate from his own property so that whatever is a part of my estate may be readily ascertainable at the time of my husband's death."

The second paragraph of her will, after specific legacies and a specific devise, gives "Out of the estate that remains, if any such there is, at the decease of my husband" all the rest and residue to Bertha Trull, undoubtedly the defendant described in the bill as Bertha P. Trull.

The will of Ezra Trull, after a bequest of specific personal property to his widow, gave all the residue of his estate to trustees (whose successors in trust are the plaintiffs), to hold the property with full power of sale, investment and reinvestment, and to pay from the income thereof to his wife $6,000 annually during her life, and the balance of income to his three children. In the event of the death of any of his children, leaving a child or children, during the lifetime of his widow, the trustees were directed to pay to such child or children in equal shares the amount of income that would have been paid to their father or mother had he or she been living. The will further provided for the payment of excess income in the event of the death of any of the children during the lifetime of the widow, leaving no child or children.

The will also contained provisions for the division of the income among the three children after the death of their mother. These were independent provisions, and were alike in all substantial particulars. Inasmuch as Ezra J. Trull was the first of the children to die, it is convenient to apply the terms of the will to the conditions existing with reference to the provisions primarily for his benefit. Its terms are printed above.

On the death of Ezra J. Trull, if he had left "children or grand-

children," they would have been entitled to one third of the principal of the trust estate; but as he left no issue, the entire property continued to be held in trust, the third of the income which had been payable to Ezra having become payable to Mary F. and Annette F. in equal shares. In case either or both of them had died leaving children or grandchildren, such issue would have been entitled to the one third of the principal to which the children of Ezra would have been entitled if such children there had been. The will then continued: "and in case my son shall survive both my other children then upon his decease leaving no children or grandchildren I direct my trustees to pay over, convey and distribute all said trust estate as it would legally descend to and among my heirs at law the children and grandchildren taking the portion that would have fallen to their respective parents." Inasmuch as Ezra did not survive his sisters, this provision did not take effect.

When Mary F. (Trull) Swords died, the situation was similar to that at her brother's death. As she left no issue, there was no distribution of any part of the principal, and her sister Annette F. became the recipient of the entire income. When Annette died, leaving no children nor grandchildren, the trustees were directed to pay over all of the trust estate in words identical with those quoted when considering contingencies which might have arisen on the death of Ezra J. Trull.

The question for decision is, whether, under this provision, the heirs at law of Ezra Trull are to be determined by construing the will as creating a remainder vested in his heirs at his death, or one that was contingent and did not vest until the death of the survivor of his children.

It seems clear that the testator did not actually contemplate that all of his children would die without issue. The reiterated provisions, that "children and grandchildren" should take the portion that would have fallen to their respective parents, so demonstrates. The will, however, does not contain any words of contingency or future determination that require a postponement of the vesting of interests given thereunder, or take its provisions out of the general rule that interests are to be construed as vested at the death of the testator, unless a contrary intent appears or a different construction is required in order to effectuate the testa-

tor's indicated legal desire. The will is distinguishable from that construed in *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35. Here it does not appear, as in that case, that the use of the words "heirs at law" excludes the issue of other children who must have died before its construction could be a necessity. If the son Ezra or the daughter Mary had died leaving issue, such issue would have taken a part of the principal of the trust property. There is no distinction between descendants and heirs, as in the Blanchard case; and other differences there emphasized do not here exist. We think that the case falls within the authority of *Jewett* v. *Jewett*, 200 Mass. 310, and cases there collected.

It is clear that Annette C. Trull, the widow of the testator, did not take any interest under the will other than the provisions therein made for her. *Holmes* v. *Holmes*, 194 Mass. 552. *Gardner* v. *Skinner*, 195 Mass. 164. *Bragg* v. *Litchfield*, 212 Mass. 148.

It was agreed at the argument that the trust fund consists of both real and personal property; but it does not appear whether the personal property represents in whole or in part proceeds of real estate, whether the real property now held is an investment of personalty made by the trustees under the authority given in the will, or whether it was a part of the estate of the testator at the time of his death.

The plaintiffs are instructed that the persons claiming under Annette F. Hittinger are entitled to the property in their hands, the same to be paid or transferred in such manner as may be found proper; and the terms of the decree, including all questions of costs as between solicitor and client, may be settled by a single justice. *Springfield Safe Deposit & Trust Co.* v. *Dwelly*, 219 Mass. 65.

Ordered accordingly.

GEORGE M. SULLIVAN *vs.* RIDGWAY CONSTRUCTION COMPANY.

Suffolk. March 9, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Negligence, In maintenance of place of amusement, Assumption of risk. *Minor.*

A corporation, maintaining at a beach resort an amusement device, which in part consists of a slide down which one using it is propelled to a moving belt whence he jumps to the floor, in the absence of any negligence in its construction, condition or operation, is not liable for personal injuries received by one who, having used the device five or six times before so that he is familiar with the manner of its use and the sensation caused thereby, enters it when a large crowd is present and, because of the crowd, is injured when he jumps from the moving belt.

The decision above described was reached without considering any defence involved in the fact that the injured person was a minor and had entered the device upon a ticket having on its reverse side this language: "No charge is made for the use of Amusement Devices in the Pit or Gymnasium, but persons using same agree to assume all risk of personal injury and loss or damage to property."

TORT for personal injuries alleged to have been received by the plaintiff while in a place of amusement called the "Pit," maintained by the defendant at Revere Beach in Revere. Writ dated July 24, 1918.

In the Superior Court, the action was tried before *Morton*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant and reported the action to this court for determination.

The case was submitted on briefs.

J. F. Daly, for the plaintiff.

E. C. Stone & W. D. Gray, for the defendant.

JENNEY, J. George M. Sullivan, who was nineteen years old at the time of the accident hereinafter described, seeks to recover damages from the defendant, Ridgway Construction Company, for an injury to his right ankle received on Sunday, July 7, 1918, and caused by "jumping from a revolving belt at the bottom of a chute or slide" in a place of amusement known as the "Pit" at Revere Beach in the city of Revere. This place of amusement

contained "a revolving wheel, centrifugal whirl, a blower, and the chute or slide on which the plaintiff claimed to have been injured. The entrance to this chute or slide is reached by climbing a short flight of stairs. The slide is built on an incline and is about twenty-four inches in width, divided in the centre by a partition, making two troughs twelve inches wide. To use this slide, 'You walk up the stairs to the platform, sit down in the trough and slide to the bottom, where you land on a moving rubber belt and are propelled a short distance when you jump off on the floor. The rubber belt is about the height of a chair from the floor.' The plaintiff testified that, when he got into the Pit, there were so many there that 'There couldn't very many more come in, about fifty more.' That 'It seemed that every amusement place was crowded.' That he and his friend tried two or three other amusements, and about five or ten minutes after they entered the Pit, they climbed the flight of stairs to the top of the slide; that there was an officer there, who wore a uniform, or at least a cap. That he went down the slide, reached the leather belt all right, and it was carrying him along all right. That 'There was such a crowd in that place where you land, I had no place to land, and I could not stay on the leather belt, because it was revolving, and I had to jump off somewhere, and I landed on someone's foot, — that was the cause of the accident.'" The plaintiff further testified that he had been at the defendant's place of amusement three or four times, and had used "this same slide about five or six times before;" that he knew that when he reached the bottom of the slide, he would land on the belt, and would be obliged to jump from there to the floor; that there was no guard at the foot of the slide at the time of the accident, and that he would not have needed any guard to assist him if there had been no crowd there; that before he used the slide he saw the crowd; that he knew the crowd was there when he started to use the slide; and that he "slid down knowing the conditions as they were down below." He further testified that he was admitted to the defendant's premises upon a ticket previously purchased by him which had on the reverse side this language: "No charge is made for the use of Amusement Devices in the Pit or Gymnasium, but persons using same agree to assume all risk of personal injury and loss or damage to property." There was no evidence that guards

were employed by the defendant to assist people in alighting from the chute.

Disregarding any defences involved in the special limitation of liability contained in the terms under which the plaintiff was on the defendant's premises, we think that the verdict for the defendant was ordered rightly. The defendant's conduct in permitting the presence of a crowd was not negligent on the facts shown. The slide apparently was designed to attract persons to use it because of its novel and unusual character. There was no evidence of negligence in its construction, condition or operation as a device of the character described. The plaintiff was familiar from previous experience with the manner of its use, and the sensations caused thereby, and no warning was necessary of the obvious and known conditions and dangers to which he voluntarily subjected himself. See *Mellor* v. *Merchants' Manuf. Co.* 150 Mass. 362; *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, 158; *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135; *Hunnewell* v. *Haskell*, 174 Mass. 557; *Hunt* v. *Economic Machinery Co.* 231 Mass. 155.

Judgment on the verdict.

CAROLINE G. HESSELTINE, executrix, *vs.* GERTRUDE R. PARTRIDGE & others.

Middlesex. March 10, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Devise and Legacy, Acceleration of estate in remainder by waiver of life estate by widow, Residue.

A testator, when he made his will, owned five parcels of real estate. By his will he purported to give to his widow for life the first and second parcels and the "use and occupation" of the third "so long as she shall desire to reside therein," and, after the death of the widow, he gave the first parcel to his son, and the second to his two daughters. The third parcel he gave to his two daughters subject to the widow's personal right to "use and occupation." The fourth and fifth parcels were devised to the son. Certain specific legacies were given to the widow and the son and "all the remainder" of the estate to the daughters. Previous to his death, the testator sold the second and the fifth parcels. At his death the testator left real estate valued at $72,700 and personal property

which, after payment of debts and expenses of administration, exceeded $55,800. The widow was appointed executrix and waived the provisions of the will in her favor under R. L. c. 135, § 16. Thereafter she as executrix received the income from the first parcel of real estate described in the will among other properties, appropriated one third thereof to her own use, and, both the son and the two daughters claiming the remaining two thirds, brought a bill in equity to determine to whom payment should be made. The will contained no provision that the residuary legatees should not suffer upon a waiver by the widow of the provisions of the will for her benefit. The suit was heard upon an agreed statement of facts, in which there was not shown any basis for an apportionment of losses as between specific legatees. *Held*, that

(1) The waiver by the widow of her life estate in the property in question accelerated the estate in remainder given to the son, and, no intention to the contrary appearing in the will, the loss occasioned thereby must fall upon the residuary legatees;

(2) No adjustment of losses as between the specific devisees could be made upon the facts agreed upon;

(3) The executrix should pay the remaining two thirds of the income from the first parcel to the son of the testator.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex by the executrix of the will of Francis S. Hesseltine, late of Newton, for instructions relating to the disposition of two thirds of the income from a certain parcel of real estate owned by the testator at the time of his death and disposed of by his will.

The suit was heard upon an agreed statement of facts by *L. E. Chamberlain*, J., who filed a decree instructing the plaintiff that payment be made to the testator's son, Norman F. Hesseltine; and the testator's daughters appealed.

J. H. Knight, for the daughters of the testator.

T. W. Proctor, for the son of the testator.

JENNEY, J. Francis S. Hesseltine died testate February 17, 1916, leaving a widow, who is the plaintiff, a son, Norman F. Hesseltine, and two daughters, Marion E. Hesseltine and Gertrude R. Partridge. His estate consisted of personal property, inventoried as of the value of $77,831.87, and real estate as of the value of $72,700. The debts and expenses of administration did not exceed $12,000. His real estate, as described in the will, was situated on Concord Square, Huntington Avenue, Tremont Street, and Townsend Street in Boston, and West Emerson Street in Melrose. The testator sold, after the will had been made, the property situated on Huntington Avenue and on Townsend Street. Presumably the proceeds thereof increased the amount of his per-

sonal estate, as it did not appear that the sums received had been invested in any other landed property.

By his will he purported to give to his widow the real estate on Concord Square and on Huntington Avenue for life, "the use and occupation" of his house in Melrose, "so long as she shall desire to reside therein, and the use" of his furniture, useful and ornamental, and personal property therein situated "as long as she shall desire to use and enjoy the same." On her death, the Concord Square property was devised to his son, a part of the property on Huntington Avenue was devised to his daughter Gertrude, and the remainder of that property to his daughter Marion. The Tremont Street and Townsend Street properties were devised to the son; and the Melrose property, subject to the personal right of the widow to use and occupy it, was given to the daughters. After legacies of specific personal property to his wife and his son, and a bequest of $5,000 to the latter, his daughters were given "all the remainder" of the estate.

The widow duly waived the provisions of the will in her favor, and thereby became entitled to the interest in his estate provided in R. L. c. 135, § 16, which in this case amounted to $10,000 out of the personal property and the income of one third of all the other property, real or personal. The will must be "interpreted as if it contained no provision for her." *Crocker* v. *Crocker*, 230 Mass. 478. The widow has received one third of the net income from the Concord Square and Melrose properties and from "all other property" except the specific and general legacies to the son.

It thus appears that by the sale of the Huntington Avenue and the Townsend Street houses in the testator's lifetime, the specific devises thereof to the daughters and son have become wholly inoperative; that the unqualified life estate of the widow in the Concord Square house and her qualified interest in that in Melrose have ceased; that the residue of the estate has been depleted by the waiver by the wife of the terms of the will in her favor; and that the son has lost one third of the unstated income of the Townsend Street house.

The controversy concerns the income of the Concord Square property, claimed by the daughters "either as a part of the residue or as compensation for the loss suffered by them," as specific devisees of the Melrose property and "as residuary legatees and

devisees by reason of the waiver by the widow of the provisions of the will in her favor and her claim to her statutory distributive share of the testator's estate."

The two thirds part of the income of the Concord Square property is not stated in the agreed facts upon which the case has been submitted. However, it is given in the bill and fixed in the decree of the Probate Court as $641.16, and as the filed objections to the decree accompanying the appeal therefrom do not assign any error in the amount so determined, it is assumed to be correct. Two thirds of the net income of the Melrose property for the same period is $307.26.

It is well settled that in cases like that under consideration, in the absence of a definite disclosed intention to the contrary, the residuary legatees suffer because of depletion of the estate; that the loss to particular legatees by reason of such depletion may be apportioned between disappointed legatees unless a contrary purpose appears; and that where such equitable compensation ought not to be made, a devise in remainder after a life estate is accelerated on the destruction of a life estate by reason of a waiver of the provisions of the will creating it, and takes effect at once. The purpose of the doctrine invoked is not a readjustment between legatees, because of "disappointment in expectation," but is to effectuate an indicated testamentary desire. *Crocker* v. *Crocker, supra. Pace* v. *Pace,* 271 Ill. 114. See 18 L. R. A. (N. S.) 275, note.

There is nothing in the will showing an intent to shift the burden from the residuary legatees. The question arises solely between the son on the one side and the daughters on the other. The daughters only are interested in the residue; hence the case does not come within the doctrine of *Shreve* v. *Shreve,* 176 Mass. 456. In that case all the parties were interested in the residue, and the amount of diminution of the income thereof was equitably apportioned.

Neither can the loss to particular legatees be apportioned. The son has been deprived of a part of his income in the Tremont Street property; he has gained by the renouncement of the life estate in the Concord Square house. The *residuum* of the estate has been increased by an unascertained amount on account of the failure of the wife's absolute legacy of personal property and her

right to use other personal property. The daughters' devise of the house in Melrose is now free from the right of the widow to reside therein. The privilege of the use of this property as a residence was an interest in real estate of an unascertained, and probably indeterminate, value. *Kingman* v. *Kingman*, 121 Mass. 249. *Faxon* v. *Faxon*, 174 Mass. 509. *Dallinger* v. *Merrill*, 224 Mass. 534. The clause giving this qualified interest to the widow is to be construed in connection with the general devise of the same property to the daughters. These clauses considered together are not repugnant to each other, and both would have taken effect if the widow had not waived the provisions of the will. *Dallinger* v. *Merrill, supra*. There is no way apparent on the record from which, between the children of the testator, losses of specific devisees can be apportioned. Clearly a present adjustment should be made or provided for. The result cannot depend upon changes in sale or rental value of the property.

It follows that the decree of the Probate Court must be affirmed, except that the question of costs as between solicitor and client may be determined by a single justice.

Ordered accordingly.

NEW YORK CENTRAL RAILROAD COMPANY & another *vs.* DAVID STONEMAN & another.

Suffolk. March 11, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Landlord and Tenant, Construction of lease. *Contract*, Construction. *Agency*, Effect of agent's knowledge not communicated to principal. *Evidence*, Extrinsic affecting writings, Judicial notice. *Equity Pleading and Practice*, Decree, Costs. *Director General of Railroads.*

A judge, who heard a suit in equity by a railroad corporation against a mortgagee in possession of certain real estate which the mortgagor had let to the plaintiff by a lease in writing whose provisions the mortgagee had agreed to be bound by, among others a provision relating to heat to be furnished by the lessor which was ambiguous as to whether the premises should be heated nights and on holidays and Sundays, found, upon evidence warranting the findings, that, while the character of the plaintiff's business required that the premises should be heated on all days and nights, the lessor was not informed of that fact;

that the lease was drawn by agents of the plaintiff; that to supply heat nights and on holidays and Sundays would require a large expenditure by the defendant; that the building was of a class usually not heated nights or on holidays or Sundays; that certain conduct of the lessor and of the defendant in keeping the premises comfortably heated nights and holidays and Sundays had no reference to an interpretation of the requirements of the lease in that respect, but that, when the defendant understood that the plaintiff claimed a right to such heat, he denied the right, while asserting his willingness to act so as not to embarrass the federal government, then operating the plaintiff. By order of the judge a final decree was entered dismissing the bill. Upon an appeal by the plaintiff, it was *held*, that no error appeared in the findings or rulings of the judge.

At the hearing above described, a broker, who had acted for the lessor in procuring the lease, testified that an authorized representative of the plaintiff had spoken to him "of there being employees there at night," and that he knew "that the night force was to some extent to occupy the premises;" and the attorney who acted for the plaintiff in making the lease testified that he informed the broker that it would be necessary for the plaintiff to have a night force. *Held*, that the above evidence did not as a matter of law require a finding by the judge that the broker of the lessor knew that the premises were to be used by the plaintiff days and nights without interruption.

At the hearing above described, it appeared that the defendant, after hearing of the claim of the plaintiff that it was entitled under the lease to heat days and nights without interruption, continued thus to furnish heat, and the plaintiff contended that this was a construction of the ambiguous provision of the lease by conduct which bound the defendant. The defendant offered, and, subject to an exception by the plaintiff, the judge admitted evidence of conversations between the defendant and his agent, which tended to explain such conduct of the defendant and to show that it was not a construction of the contract favorable to the plaintiff. *Held*, that the evidence properly was admitted.

Where a suit in equity, brought by a railroad corporation and by the Director General of Railroads in 1918, was dismissed by a final decree on January 26, 1920, "with costs to the defendants," this court took judicial notice of the fact that at the time of the entry of the decree the Director General of Railroads no longer was operating the railroad, and ordered that the decree be so modified as to provide that he be not required to pay costs.

BILL IN EQUITY, filed in the Superior Court on October 29, 1918, by the New York Central Railroad Company, lessee of the Boston and Albany Railroad, and W. G. McAdoo, the then Director General of Railroads, seeking specific performance of the provisions of a lease for five years made by the owners of a seven-story building numbered 57 Kneeland Street in Boston, which the defendants, then mortgagees of the premises, assented to and agreed to be bound by in case they foreclosed their mortgage before the termination of the lease. The prayers of the bill were in substance that the defendants be required to furnish heat for the

leased premises on Sundays and holidays and between the hours of six o'clock in the afternoon and seven o'clock in the morning.

The suit first was heard by *J. F. Brown*, J., who ruled that, upon certain facts found by him, the suit could not be maintained and reported the case to this court, who decided, as reported in 233 Mass. 258, that the ruling was wrong and remanded the case to the Superior Court for further hearing.

The suit was heard a second time by *Wait*, J., a commissioner having been appointed under Equity Rule 35 to take the evidence. Material evidence and findings of the judge are described in the opinion. By order of the judge a final decree was entered on January 26, 1920, dismissing the bill "with costs to the defendants taxed at $29.48;" and the plaintiff railroad company appealed.

C. O. Pengra, (*R. A. Stewart* with him,) for the plaintiff railroad company.

C. S. Hill, for the defendants.

JENNEY, J. This is a suit in equity in which the plaintiffs seek the specific performance of an agreement to heat the premises demised in a certain lease, claiming that the true construction of the lease requires the furnishing of heat throughout the entire term thereof without any interruption, except during such time as artificial heat is unnecessary.

This case was before the court in *New York Central Railroad* v. *Stoneman*, 233 Mass. 258, where it was decided that the present defendants were bound by the true interpretation of the lease, and that the provision therein contained, "'that the demised premises shall be heated by the lessors to a proper warmth for office purposes,' relates only to the degree of heat to be furnished and not to the time during which heat is to be furnished." In regard to the latter question, it was held that the covenant of the lease was "ambiguous and of doubtful meaning," and that evidence was admissible of the circumstances attendant on the making of the demise, and of the practical construction placed upon the provision as to heating, in order to determine its true meaning. This court directed the case to stand for further hearing, since it was of the opinion that the ruling that, as a matter of law, the bill could not be maintained, was erroneous.

After full hearing, a commissioner having been appointed to take the evidence, the case is now before us solely on the plain-

tiffs' appeal from a decree dismissing the bill. The trial judge also made findings of facts which are conclusive, unless unsupported by evidence and plainly erroneous. *Donnelly* v. *Alden*, 229 Mass. 109.

1. The judge found that the lease was prepared by the agents of the plaintiff corporation; that the lessors "had no knowledge of the methods and hours of use contemplated by the lessee, other than that they knew the premises were to be used as a freight office for its freight terminal at Boston, and that some of the clerks would work at night." They were not told, however, by their broker, with whom all the negotiations were had, that "the office would require heat day and night." There was "no evidence anything was said of Sundays and holidays, or in regard to work all night." The defendants knew only that the purpose of the lessee to use the premises for a freight office required a temperature of about seventy degrees. During the term of the lease, other transportation companies in Boston kept their freight offices, which were on the railroad property, open "twenty-four hours in the day, Sundays and holidays included, and properly heated," although the force employed varied. It was necessary to run freight trains on Sundays and holidays, and to keep clerks at work continuously in freight offices, it being, however, possible to avoid this, but neither usual nor reasonable so to do; the lessee was authorized to run trains on Sundays, and in order to do this clerks must work on that day. To modify the heating system of the building in which the leased premises are situated, so as to enable the landlord to supply heat on nights, Sundays and holidays to the plaintiffs only, would involve a large expenditure; and the building in question is of the class usually heated from seven o'clock in the morning to six o'clock in the afternoon on ordinary working days of the year. There is usually inserted in leases of buildings containing manufacturing establishments, where heat is to be supplied by the lessors, a clause in regard to the "reasonable and customary business hours" within which heat is to be furnished, or some clause to that effect.

2. The evidence relating to the construction of the lease by the parties was susceptible of more than one conclusion. The plaintiffs contend that the acts of the lessors in furnishing heat was a practical construction in accordance with the plaintiffs'

contention, while the defendants claim that they did not so operate because of the following facts found by the judge. The heating plant was designed for the use of anthracite coal. Where such coal is used, fires may be banked in the late afternoon, and yet during the night give sufficient heat to maintain a comfortable temperature except in extreme weather. Until late in December, 1917, when the coal famine became acute, the heating plant was run in this way without the use of any extra coal or help at night. The lessors were driven by the coal famine to use bituminous coal. Where this coal is used, it is not possible to maintain heat with the fires banked, and it is economical to attend to the fires in the night, rather than to permit them to go out; furthermore, because the use of bituminous coal caused trouble with the heating plant, it was necessary to run fires night and day to prevent injury to the heating system. This change made necessary the employment of a night man, and fires were run both day and night from late December, 1917, until the end of the cold weather in the spring of 1918. While complaint was made in the winter of 1917–18 as to sufficiency of heat, it related to days as well as nights, although during the winter the lessee made known to the lessors for the first time that it claimed the right to have the premises heated continuously. This claim was denied, the lessors promising, however, to do all in their power to accommodate the lessee with heat at all times; and this they did. The lessors ordered their agent to furnish heat throughout "what was left of the heating season so as not to embarrass the government at that time, but to notify the lessees that such heat would not be furnished with the next season." In the fall of 1918, the defendants notified the lessee that they would not furnish heat at night, or on Sundays or holidays.

From these findings of facts, the judge found that the conduct of the lessors under the circumstances showed that what they had done as to furnishing heat had no reference to the interpretation of the lease; that the lessors never until December, 1917, considered furnishing heat throughout twenty-four hours in the day, Sundays and holidays included; that they did not know the lessee so construed the lease until "at the earliest, late December of 1917;" and that they did not by their conduct assent to, or make, the claimed interpretation.

The plaintiffs do not complain of any of these findings, except such as relate to the legal effect of the specific facts found, and those as to the knowledge of the lessors of the contemplated use of the premises, basing their objection to the latter on the testimony of Diehl, who was the broker for the lessors, that the authorized representative of the plaintiff railroad company did "speak [to him] of there being employees there at night," and that he knew "that the [a] night force was to some extent to occupy the premises." The attorney who acted for the railroad corporation in making the lease testified that he informed Diehl it would be necessary to have a night force. Assuming that the knowledge of the broker was imputable to the lessors, the evidence did not require a finding that he knew that the special purpose for which the railroad corporation intended to use the premises required heat at all hours of the day and night. The judge was not bound to accept the testimony of the attorney as true, or even that of the broker concerning the more limited use of the premises. The judge did find that the lessors knew that some of the clerks would work at night. We cannot revise nor enlarge these findings. The evidence did not require a finding that the broker knew that the use of the premises contemplated was without any interruption. The record shows no primary request to make any express finding of the knowledge of the broker, nor any additional findings relating thereto. See *Robinson* v. *Brown*, 182 Mass. 266; *Rubenstein* v. *Lottow*, 220 Mass. 156, 164.

The findings, the resultant order of the judge for the dismissal of the bill, and the decree entered in accordance therewith, were warranted by the evidence. The facts as determined did not compel any ruling of law that the plaintiffs were entitled to relief, either by specific performance or by the retention of the bill for assessment of damages.

The plaintiffs contend that their exception to the admission in evidence of conversations between the defendants and their agent Susser, to explain the conduct of the defendants in continuing to furnish heat at night after learning of the plaintiffs' claim in March, 1918, must be sustained, because Susser never communicated his instructions to the lessee. The evidence was properly admitted to show the reason why the defendants continued to furnish heat, and to explain their conduct in so doing.

It neither enlarged nor diminished the rights of the plaintiffs, but simply tended to explain the conduct of the defendants on which the plaintiffs base their claim of the construction of the ambiguous term. The exception must be overruled. See St. 1913, c. 716, § 4; *Noyes* v. *Gagnon*, 225 Mass. 580.

The decree of the Superior Court must be affirmed, except that it should be so modified as to provide that the plaintiff McAdoo is not to be required to pay costs. The court must take cognizance of the fact that the New York Central Railroad is no longer operated by the Director General of Railroads, and that the primary responsibility is upon the plaintiff corporation. So modified, the decree must be affirmed.

Ordered accordingly.

ESRAEL SKLAROFF & others *vs.* COMMONWEALTH & another.

Barnstable. March 20, 1920. — May 21, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Adverse Possession. Province Lands. Commonwealth.

No title to any of the province lands lying below high water mark could be acquired by adverse possession previous to the enactment of St. 1893, c. 470; and, by reason of the repeal of that statute by R. L. c. 227, in 1902, its provisions did not permit the acquiring of such a title by adverse possession for twenty years preceding its repeal.

St. 1893, c. 470, gave no right based on adverse possession of province land preceding its enactment.

PETITION, filed in the Land Court on August 6, 1918, for the registration of the title to certain province lands in Provincetown, a portion of which was below high water mark, the petitioners basing their claim upon a title alleged to have been acquired by adverse possession.

The petition was heard by *Corbett*, J. The judge in substance found that the petitioners had acquired title to the land they claimed above high water mark, but ruled that the title of the Commonwealth to the land below high water mark was not affected by the exercise of any act of dominion on the part of the

petitioners or of their predecessors in title. The petitioners alleged exceptions.

The petitioners contended, as to the land below high water mark, that, they and their predecessors in title having been in possession of the land for twenty years before the passage of St. 1893, c. 470, the instant that statute took effect the title to the same was good even against the Commonwealth, and that this title was not affected by the later repeal of the statute.

The case was submitted on briefs.

W. Welsh, for the petitioners.

J. W. Allen, Attorney General, *J. R. Benton*, Assistant Attorney General, for the Commonwealth.

CARROLL, J. The petitioners claimed title below high water mark to certain province lands in the town of Provincetown. The Land Court found that the claim was not sustained and that the land was owned by the Commonwealth.

A deed purporting to convey these lands in Provincetown to the province of Massachusetts Bay was made prior to the year 1679 by one Sampson, an Indian; and a confirmatory deed was received on February 5, 1679, from other Indians claiming to own the property to which titles the Province of Massachusetts Bay succeeded. The land along the seashore in the town of Provincetown was very early settled by fishermen, many of whom occupied buildings thereon, and, claiming title, conveyed the land by deed. At the close of the evidence the petitioners made certain requests for rulings, which were refused. The judge of the Land Court ruled that the title of the Commonwealth to the land below high water mark was not affected by the acts of dominion of the petitioners or their predecessors in title over the same, to which ruling and refusals to rule the petitioners excepted.

"The Commonwealth of Massachusetts has all the title and rights, public and private, both of the king and the parliament of England, in every part of the sea shore of the Commonwealth, which has not vested in individuals or corporations under the colonial ordinance of 1647 or other act of the government." *Nichols* v. *Boston*, 98 Mass. 39, 42. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281. *Watuppa Reservoir Co.* v. *Fall River*, 154 Mass. 305.

By Rev. Sts. c. 119, § 12, an action for the recovery of lands by

the Commonwealth was barred unless brought within twenty years after the right accrued. Until this statute was passed, the statute of limitations did not run against the Commonwealth. *Attorney General* v. *Revere Copper Co.* 152 Mass. 444, 449, 450. St. 1854, c. 261, enacted (§ 8) that the Commonwealth was the owner in fee of all the province lands in the town of Provincetown and that no adverse possession would be sufficient to defeat its title thereto; and further (§ 9) that Rev. Sts. c. 119, § 12, should not apply to such lands. By Pub. Sts. c. 196, § 11, it was enacted that the stipulations limiting the time for the recovery of lands by the Commonwealth should not apply to the province lands in Provincetown nor to any interest of the Commonwealth below high water mark or in the great ponds. See also Gen. Sts. c. 154, § 12.

By St. 1893, c. 470, the harbor and land commissioners were given the care and supervision of the province lands in Provincetown lying north and west of a line described in this statute; and it was there provided that St. 1854, c. 261, and so much of § 11 of Pub. Sts. c. 196, as refers to the province lands in Provincetown, and all other acts relating thereto, except the one incorporating the town, should not apply to that portion of the province lands lying east and south of the line mentioned in the statute. The Land Court found that the land claimed by the petitioners lies east and south of the line referred to in St. 1893, c. 470. By R. L. c. 227, St. 1893, c. 470, was repealed. This repeal took effect on January 1, 1902. See also R. L. c. 202, § 30.

Under St. 1893, c. 470, the petitioners could claim title to the land below high water mark by adverse ownership against the Commonwealth, if they held the same for a period of twenty years after its enactment; but by R. L. c. 227 (already referred to), which went into effect January 1, 1902, that statute was repealed. The petitioners contend that they hold the land by adverse possession under St. 1893, c. 470, and their only claim to title is by reason of this statute. At most, they held possession for a period of nine years when this statute was repealed in 1902, and the period of limitation was not then complete. They acquired no title by adverse possession against the Commonwealth, prior to the enactment of St. 1893, nor since; and nothing in the language of the statute supports their contention that, as they held possession for a period of twenty years prior to St. 1893,

when no title could be acquired against the Commonwealth by adverse possession, by force of that statute they can now maintain such title against the Commonwealth. By St. 1893, c. 470, the occupants of these lands could acquire title by twenty years adverse occupation after its passage; and while the petitioners could not by the repealing statute be deprived of rights already accrued, by St. 1893 they could avail themselves only of rights it created and which came into existence after its passage; and there was no right given them by this statute based on the occupation of the land before that time. See *Bradford* v. *Metcalf*, 185 Mass. 205, 209; *Attorney General* v. *Revere Copper Co.*, *supra*, 452. The cases cited by the petitioners are not contrary to the conclusion here reached.

It follows that the decision of the Land Court, that the Commonwealth was not deprived of its title to the lands below high water mark by the acts of the petitioners, was right.

Exceptions overruled.

INDIANA FLOORING COMPANY *vs.* SAMUEL RUDNICK.

Suffolk. March 20, 1920. — May 21, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Pleading, Civil, Answer. *Practice, Civil*, Affidavit of no defence and counter affidavit. *Bills and Notes*. *Evidence*, Presumptions and burden of proof.

An affidavit of defence, filed in an action of contract by a defendant under St. 1911, c. 305, after the plaintiff has filed an affidavit of no defence, is no part of the pleadings in the action.

A partial failure of the consideration for a promissory note, in order to be relied on by the maker under R. L. c. 73, § 45, in defence to an action upon the note by the payee, must be alleged specifically in the answer.

Where, in an action upon a promissory note by the payee against the maker, the answer contains no specific allegation of a partial failure of consideration, the judge properly may refuse to instruct the jury that, "If from the evidence you find that the notes were given in accordance with an agreement for lumber to be delivered in the future, then the burden of proof is upon the plaintiff to show that it actually did send and deliver the lumber of the kind, quality and quantity called for by said agreement," such defence not being open on the pleadings and the burden of establishing such a defence, if properly pleaded, being upon the defendant.

CONTRACT on two promissory notes by the payee against the maker. Writ dated January 28, 1919.

In the Superior Court the action was tried before *Fessenden*, J. The pleadings, material evidence at the trial and exceptions by the defendant are described in the opinion. The jury found for the plaintiff in the sum of $1,338.56; and the defendant alleged exceptions.

The case was submitted on briefs.

M. H. Steur, for the defendant.

S. D. Elmore, for the plaintiff.

JENNEY, J. The Indiana Flooring Company brought this action in the Superior Court against Samuel Rudnick on two promissory notes, both made by the defendant and payable to the plaintiff. The defendant's answer is a general denial, payment, and the further allegation that, if he "ever executed said notes," he made them for the accommodation of the plaintiff and without consideration. The answer does not set up either total or partial failure of consideration. At the trial the signatures to the notes were admitted. The jury found for the plaintiff for the entire amount involved.

Evidence was admitted in behalf of the defendant, but subject to the plaintiff's exception, that the notes were given in renewal of others for like amounts, the consideration of which was a contract by the plaintiff to sell to the defendant a certain quantity of "flooring." Evidence was likewise admitted subject to the plaintiff's exception, that a substantial part of the amount of lumber required to complete the quantity specified in the contract never had been delivered to the defendant.

At the close of the evidence, the defendant requested that the jury be instructed as follows: "If from the evidence you find that the notes were given in accordance with an agreement for lumber to be delivered in the future, then the burden of proof is upon the plaintiff to show that it actually did send and deliver the lumber of the kind, quality and quantity called for by said agreement." This request was refused, subject to the defendant's exception.

In substance the judge instructed the jury that if they found that the notes were given for the plaintiff's accommodation, they should find for the defendant; that if there was no consideration

for the notes, the plaintiff could not recover; that if the notes were given for "a future delivery of lumber," which was never delivered, a like result followed. The charge then continued: "Here I want to call your attention to one thing very distinctly. This is not a case where they are pleading partial failure of consideration. Those cases sometimes trouble you. It is either the whole or nothing. . . . That is the claim. So don't trouble yourselves about this, as to whether the whole, every stick of lumber was delivered, but the question is, was there a consideration for the notes, and the burden is on the plaintiff to show that. It is not on the defendant to show that there was no consideration. . . . It is not for us to say that under these pleadings, for if there were a claim that only part of it was delivered, that would be pleaded in the case, and then we should have that to try, but no suggestion is made of that in this trial. So that it is the whole or nothing. Now I do not want you to go to your room and say, 'Well, here, he admitted part of it, so we will award part, only part.'" No exception was taken to the instructions given to the jury.

Before the trial, under St. 1911, c. 305, an affidavit of no defence had been filed by the plaintiff. The defendant filed a counter affidavit, the material part of which is as follows: "That the plaintiff delivered about thirty per cent of the amount agreed upon only, and that the goods delivered were not of the kind and quality agreed upon, but of an inferior grade."

The affidavit of defence constituted no part of the pleadings. It did not enlarge nor restrict the terms of the answer, and cannot be referred to for that purpose. Under the statute the defendant was required to disclose therein "such facts as the court finds entitle him to defend," or, failing so to do, the case might be advanced for speedy trial. This was its only purpose or effect. It could not be read to the jury, except at the option of the plaintiff in case it contradicted the testimony of the defendant or contained a probative admission on his part.

A partial failure of consideration must be specially pleaded. Inasmuch as that issue was not open under the pleadings, the instruction requested was properly refused, and the defendant's exception must be overruled. Under R. L. c. 73, § 45, "partial failure of consideration is a defence *pro tanto*, whether the failure

is an ascertained and liquidated amount or otherwise." By statute such a failure is made a matter of defence as against any person not a holder in due course, and the burden of proof thereof is upon the defendant, who must set it up in his answer in case he wishes to rely upon it. R. L. c. 73, § 45. *McCormack* v. *Williams*, 88 N. J. L. 170. The common law rule was the same. *Hodgkins* v. *Moulton*, 100 Mass. 309, 310. *Shoe & Leather National Bank* v. *Wood*, 142 Mass. 563. Such a defence is analogous to that of recoupment, which must be specially pleaded. *Davis* v. *Bean*, 114 Mass. 358. *Wentworth* v. *Dows*, 117 Mass. 14. *Sayles* v. *Quinn*, 196 Mass. 492.

Exceptions overruled.

PETER E. BRAZILL *vs.* GEORGE W. GREEN & another.

Suffolk. March 2, 1920. — May 22, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Execution. Evidence, Presumptions and burden of proof. *Recognizance. Contract,* Performance and breach. *Assignment. Practice, Civil,* Parties.

Upon an execution, issued upon a judgment in an action of tort, commanding the officer, "of the goods, chattels or lands of the said judgment debtor, within your precinct, you cause to be paid and satisfied" the amount payable thereunder, and "for want of goods and chattels, or lands of the said judgment debtor, to be by him shown unto you, or found within your precinct. . . . We command you to take the body of the said judgment debtor . . ." the officer may arrest the judgment debtor without first demanding payment or searching for property on which to levy the execution.

Where, at the trial of an action upon a recognizance entered into by a judgment debtor arrested on an execution issued to enforce a judgment in an action of tort, the plaintiff introduced evidence of the judgment, the execution, the return of the officer making the arrest and the certificate of a master in chancery before whom the recognizance was entered into, and rested and no further evidence was admitted, a verdict for the defendants should have been ordered upon their motion, no breach of the recognizance being shown.

The mere fact that, after the entry of a judgment in an action of tort and the issuance of an execution for its enforcement, the judgment creditor by an instrument in writing and under seal assigned to a third person "all and whatever sum or sums of money now due and coming due to" him on the judgment, "with power to collect the same in my name and as my attorney, hereunto duly authorized to his own use," the instrument also providing that the assignor was to be saved harmless from all expense in the matter, is no defence to an action brought

in the name of the judgment creditor upon a recognizance, entered into by the judgment debtor and a surety when, after the assignment was made, the debtor was arrested upon the execution, it being necessary that the recognizance be based on the record of the judgment and it not being necessary for the assignee to bring the action thereon in his own name.

CONTRACT on a recognizance in the sum of $300 entered into by the defendant George W. Green as principal and the defendant John J. McCarthy as surety under R. L. c. 168, § 30. Writ in the Municipal Court of the City of Boston dated November 2, 1918.

Upon removal to the Superior Court the action was tried before *Morton*, J. The plaintiff introduced evidence of a judgment in tort in his favor against the defendant Green, and the issuance of an execution thereon for $151.24, damages, and $42.42, costs of suit. Subject to exceptions by the defendants, he was allowed to introduce in evidence the execution which issued on the judgment, the officer's return, showing that the defendant Green was arrested and taken before a master in chancery, where he recognized with surety for his appearance within thirty days before some court having jurisdiction to examine him as a poor debtor, and the certificate of the master in chancery. The plaintiff then rested.

The defendants offered evidence showing that after the date of the judgment and before the arrest of the judgment debtor the plaintiff had assigned the judgment to one Milton by an instrument in writing and under seal reciting that, for a consideration of $2, the plaintiff did "sell, assign, and transfer to said Henry S. Milton the judgment against George W. Green entered in the Superior Court for the County of Suffolk on August 29, 1918, all and whatever sum or sums of money now due and coming due to me from George W. Green on the judgment aforesaid of said Boston to have and to hold the same to the said Henry S. Milton with power to collect the same in my name and as my attorney, hereunto duly authorized to his own use. It is expressly understood, however, that I the said Brazill are forever to be kept and saved harmless by the said Milton from all cost or charge hereafter in any way or manner, for and from the expense of the collection of the sum and sums hereby sold and assigned." The evidence was excluded.

At the close of the evidence, the defendants moved that a ver-

dict be ordered in their favor. The motion was denied. They then asked for the following rulings:

"1. That unless the plaintiff, Peter E. Brazill, was the owner of the judgment and execution at the time of the giving of the recognizance, he cannot recover in this action.

"2. That when a judgment has been sold and assigned and an arrest made on an execution issued on said judgment after said sale and assignment, the recognizance given to release the debtor must run to the assignee, or if to the assignor, it must be expressed for the use and benefit of the assignee.

"3. That no person foreign to a record can recover thereunder.

"4. That any suit on a record no evidence can be offered to alter, change or amend the record.

"5. That on all the evidence the defendants are entitled to a verdict."

The rulings were refused. The judge ordered a verdict for the plaintiff in the penal sum of the recognizance; and the defendants alleged exceptions.

D. B. Beard, for the defendant Green.

J. L. Sheehan, for the defendant McCarthy.

H. S. Milton, for the plaintiff, submitted the case without argument or brief.

JENNEY, J. In this action on a recognizance entered into by George W. Green as principal and John J. McCarthy as surety, under R. L. c. 168, § 30, the defendants claim that the verdict ordered for the plaintiff ought not to stand. They base their objections thereto on the officer's return on the execution hereinafter referred to, on the absence of evidence of any breach of the recognizance, and on the exclusion of evidence relating to the interest of the plaintiff in the proceedings in which the recognizance was given.

The exception to the admission of the execution, of the officer's return thereon, and of the certificate of the master in chancery as to the recognizance is not argued, and is considered as waived. See concerning the questions involved in the admission of this evidence, *Peck* v. *Emery,* 1 Allen, 463; *Blake* v. *Mahan,* 2 Allen, 75; *Damon* v. *Carrol,* 163 Mass. 404; *Bent* v. *Stone,* 184 Mass. 92; *Warburton* v. *Gourse,* 193 Mass. 203.

1. It is contended that the officer's return shows no legal arrest

of the defendant Green, and that the recognizance is void for that reason. The execution was issued in an action of tort; therefore no preliminary affidavit and certificate were necessary. R. L. c. 168, § 17. The execution, which is in the usual form, commands the officer, "of the goods, chattels, or lands of the said judgment debtor, within your precinct, you cause to be paid and satisfied" the amount payable thereunder, and "for want of goods and chattels, or lands of the said judgment debtor, to be by him shown unto you, or found within your precinct. . . . We command you to take the body of the said judgment debtor. . . ." The officer's return does not show any demand for payment on Green or any failure on his part to satisfy the execution or expose "goods, chattels, or lands" to be applied in payment thereof. An officer, having in his hands an execution authorizing the arrest of a judgment debtor, is not obliged before making an arrest thereon to demand payment, or to search for property on which to levy the execution. It is provided in R. L. c. 177, § 28: "If an execution is in the alternative, so that it may be lawfully served in any of two or more ways, the creditor or his attorney may require the officer to serve it in any of said ways; and the officer shall conform to such directions if it is in his power." In *Dooley* v. *Cotton*, 3 Gray, 496, at page 497, it was said: "That our process of writ of execution being in the alternative, to take either goods and chattels, or lands, or the body of the debtor, either of the three modes may be selected by the creditor, or by the sheriff, with the privity or subsequent assent of the creditor, has been long sanctioned by practice, and good authority. *Lyman* v. *Lyman*, 11 Mass. 317. *Woodward* v. *Hopkins*, 2 Gray, 210, 213. It seems also to be sanctioned by the express provisions of the Rev. Sts. c. 97, § 12." In *Webber* v. *Davis*, 5 Allen, 393, at page 397, this court said: "The defendants objected that the officer's return on the execution did not state that he had made any search for the goods, chattels and lands of Davis within his precinct, or that he was directed to arrest the body of Davis. No authority is cited in support of this objection, and the want of such search, or of directions from the plaintiff, could not make the arrest illegal. An execution had been put into his hands, having upon it a certificate such as the statute requires to authorize the arrest of the defendant, and that was sufficient." See also *Hoar* v. *Tilden*, 178 Mass. 157.

The only intimation to the contrary is found in *O'Brien* v. *Annis*, 120 Mass. 143, where the question involved was whether a constable had so far proceeded in the service of an execution as to justify him in continuing to act thereunder after his term of office had expired, and where at page 145 it was said: "The execution delivered to him was only to be served by arrest of the person for want of goods, effects or credits to be exhibited by the trustees, and for want of property of the principal defendant which he could find." The statute, and the cases from which quotations have been made, were not referred to, and the broad language used cannot be construed as an attempt to overrule the cases or limit the statute. The case is authority for the proposition that a demand on a trustee named in an execution, and a diligent search for goods and effects of the principal defendant are a commencement of its service. Even if not necessary, such proceedings were proper, and such a demand on a trustee is necessary in order to protect fully the rights of a judgment creditor. R. L. c. 189, §§ 40, 41. See *Swan* v. *Justices of the Superior Court*, 222 Mass. 542, 545.

2. A verdict should have been ordered for the defendants, because there was no evidence of any breach of the recognizance. *Damon* v. *Carrol*, *supra*. *Temple* v. *Phelps*, 193 Mass. 297, 302. See R. L. c. 173, § 6, cl. 11.

3. The defendants offered to prove that, after the execution had been issued against Green and in favor of Brazill, but before the arrest of Green thereon, the plaintiff had executed a written assignment of the judgment to Henry S. Milton. There was no offer of proof that Brazill was acting otherwise than for the benefit of his assignee. The evidence was properly excluded, because if admitted it did not constitute a defence. The judgment, although not assignable at common law, could be transferred in equity. *Dunn* v. *Snell*, 15 Mass. 481. *Norton* v. *Piscataqua Fire & Marine Ins. Co.* 111 Mass. 532. *Baker* v. *Wood*, 157 U. S. 212. *Hayes* v. *Rich*, 101 Maine, 314. It has been held under a statute similar to R. L. c. 173, § 4, that a judgment can be transferred by written assignment so that an action thereon may be brought in the name of the assignee. *Wood* v. *Decoster*, 66 Maine, 542. *Ware* v. *Bucksport & Bangor Railroad*, 69 Maine, 97. The assignment offered in evidence, having been made after the recovery of judgment and

the issuance of the execution, did not substitute the assignee as the judgment creditor, and proceedings upon the execution necessarily continued in the name of the assignor who was still a party of record. When after the arrest, a recognizance was given, it was of necessity based on the record. An action thereon can be maintained in the name of the judgment creditor for the benefit of the assignee of the judgment. The recognizance took the place of the body of the defendant Green, and the beneficial interest therein passed without any formal transfer as an incident to the judgment; but there being no written assignment of the recognizance, the assignee of the judgment was not within R. L. c. 173, § 4. *Rogers* v. *Abbot*, 206 Mass. 270. It was not necessary to bring the action for the benefit of the assignee. *Moore* v. *Spiegel*, 143 Mass. 413. *Kelly* v. *Greany*, 216 Mass. 296. The extended terms of a recognizance taken under R. L. c. 168, §§ 29, 30, closely follow the recitals in an execution, and such recognizance properly runs to the judgment creditor. *Commonwealth* v. *Cutter*, 156 Mass. 52. *Bolen* v. *Crosby*, 49 N. Y. 183.

Although the exception of the defendants to the refusal to allow their motion for the direction of a verdict must be sustained, because there was no evidence of a breach of the recognizance, the other questions argued by the defendants have been considered, as they may arise in the course of another trial of this action.

Exceptions sustained.

BOSTON AND MAINE RAILROAD *vs.* T. STUART AND SON COMPANY.

Middlesex. January 12, 1920. — May 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Contract, Of indemnity, Performance and breach. *Negligence*, Of contractor in elimination of grade crossing. *Pleading, Civil*, Demurrer. *Practice, Civil*, Case stated, Report.

A railroad corporation, ordered by a decree under St. 1906, c. 463, Part I, §§ 29 *et seq.*, to abolish a crossing at grade with a highway, made an agreement in writing with a contractor to perform the work, the contractor agreeing to indemnify and save the railroad corporation harmless from all claims on account of injury caused by its acts or omissions to persons or property of others. One,

who in the night time fell over a stake placed by the contractor, brought actions against the railroad corporation and the contractor, and the railroad corporation gave the contractor notice and an opportunity to defend the action against it. At the trial of the actions the plaintiff contended that the defendants were liable because the stake was left protruding and because it was left unprotected and unlighted. The jury found only that there was negligence in leaving the stake unprotected and unlighted, and found for the plaintiff in both actions. *Held*, that

(1) The contractor, having been notified and given an opportunity to defend the action against the railroad corporation, was concluded as to all questions determined therein which were incident to a right of the railroad corporation to recover upon the agreement of indemnity;

(2) The negligence which the jury found caused the injury was negligence which, as between the railroad corporation and the contractor, was negligence solely of the contractor;

(3) The express language of the contract of indemnity did not require that it should be construed as one indemnifying the railroad corporation against the consequences of its own negligence; and the contract was valid;

(4) The contractor must respond in damages to the railroad corporation by reason of the contract to indemnify.

While, ordinarily, the only question open upon a report of an action at law under St. 1917, c. 345, upon a case stated without any decision being made is, whether the plaintiff can recover in any form of action, the judge in such a report by agreement of the parties may reserve the rights of the defendant upon its appeal, previously taken, from an order overruling a demurrer to the declaration.

Where a judge under R. L. c. 173, § 105, reported for determination by this court the correctness of an order overruling a demurrer to the declaration in an action of contract, and also, under St. 1917, c. 345, reported the action upon a case stated, the defendant's rights under an appeal from the overruling of his demurrer being reserved, and it appeared that the demurrer should have been sustained but that upon the case stated the plaintiff should recover, this court ordered that the plaintiff should have leave to amend, and that, upon the allowance of an amendment stating a cause of action founded upon the case stated, judgment should be entered for the plaintiff.

CONTRACT upon an agreement in writing whereby the defendant agreed to "indemnify and save [the plaintiff] harmless . . . against any and all claims for damages, on account of injury by any act or omission of" the defendant or its servants or agents, resulting to the persons or property of others during the progress of work in abolition of a railroad crossing at grade in Somerville. Writ dated July 18, 1916.

In the Superior Court the defendant demurred to a substituted declaration, the demurrer was overruled, and the defendant appealed. The case was heard by *Hammond*, J., without a jury, upon a case stated. Material facts are stated in the opinion. At the request of the parties the judge reported the ruling overruling

the demurrer under R. L. c. 173, § 105, and under St. 1917, c. 345, without making any decision, reported the case upon its merits (the defendant not waiving its demurrer) to this court for determination.

G. M. Poland, (*L. P. Jordan* with him,) for the defendant.

J. M. O'Donoghue, for the plaintiff.

JENNEY, J. This action is before us on a case stated, reported by a judge of the Superior Court under St. 1917, c. 345, without any decision. The facts, so far as material, are as follows:

"The plaintiff and the defendant on June 24, 1912, made an agreement in writing . . . concerning the work to be done and the material to be used" in the elimination of a railroad crossing at grade in Somerville. The railroad corporation was required to abolish this crossing by a decree of the Superior Court, entered under St. 1906, c. 463, Part I, §§ 29 *et seq.* The decree ordered a change in the grade of Village Street, a private way. Under the contract the defendant was required to "provide materials and perform all the work . . . under the direction, and to the satisfaction of the Chief Engineer of the [railroad corporation]." It was further stipulated that the contractor should be "solely responsible for all work and men employed," and should "indemnify and save harmless the Company against any and all claims for damages, on account of injury by any act or omission of the Contractor, his agents or servants, to any property of, or under the control of the Company, and to Company's servants and passengers and their property, and to the persons and property of others, during the progress of the work under this contract, and that, in case any action, or actions, or other legal proceedings, shall be brought or instituted against the Company on account of any such claims, or on account of any unauthorized or illegal interference by the Contractor, his agents or servants, with any highway or travel thereon, the Contractor will assume the defense thereof, and will indemnify and save harmless the Company against all costs, expenses, counsel fees and judgments resulting therefrom." The specifications which were made a part of the contract also placed on the defendant the obligation to "keep the streets open to traffic, so far as possible, during the execution of the work;" "to indemnify and hold harmless the . . . Railroad from all claims of any description brought against it on account of

anything connected with him [it], his [its] employees, appliances or operations;" and to "take proper precautions to prevent accidents by placing and maintaining fences and lights where needed." They further provided in effect for the giving of lines by the chief engineer.

On May 6, 1913, about three o'clock in the morning, during the time that the defendant was engaged in work required by the contract, Frederic W. Coles fell over one of a row of stakes that had been driven by direction of the engineer of the railroad corporation at the request of the contractor, for the purpose of defining the line of Village Street. The stake projected three or four inches above the sidewalk. The railroad corporation employed no watchmen, placed no barriers or lights in the vicinity of the place where the accident happened, and did no work in that neighborhood, other than "to give lines and grades to the contractor." The defendant at that time maintained barriers and lights in Village Street, and employed "a person whose duty it was to see that the lanterns remained lighted and the barriers remained unmoved during the night and . . . said person was working on Dane Street [with which Village Street connected] or thereabouts on the night" of the accident.

Coles brought actions, which were tried together, against both parties to this proceeding. He recovered judgment against each for $9,000 and costs. See *Coles* v. *Boston & Maine Railroad*, 223 Mass. 408. The right of Coles to enter on the private way is not now involved.

At the trial of the cases in which Coles was plaintiff, he based his right of recovery against both defendants on the negligent placing of the stake, and upon negligence in leaving it unguarded and unlighted. Special questions submitted to the jury and the findings thereon were the same in each case, and were as follows:

"What was the approximate cause or causes of the plaintiff's accident?" The jury answered, "He stumbled over protruding stake in beaten path."

"Was the defendant . . . negligent? If you answer yes, state what that negligence was." The jury answered, "Unprotected condition of the protruding stake."

Other questions and answers settled the questions of fact involved in the due care of Coles in his favor, and fixed the amount

of damages. The exceptions presented by the defendants were overruled, (*Coles* v. *Boston & Maine Railroad, supra,*) and the judgments have been satisfied by the present parties, each of whom has paid a part thereof under an agreement between themselves that whatever payment was made by either, was made without prejudice to the right of indemnity against the other. It was expressly agreed that each of the defendants in those actions by Coles should have the same right of indemnity against the other defendant in said actions, for any money so paid to satisfy said judgments in whole or in part that there would have been in case the amount had been paid on execution.

Thereupon, the plaintiff brought this action to recover the amount so paid by it in part satisfaction of said judgment, and for its expenses properly incurred. The amount for which judgment is to be entered in this case, if the defendant is held, is fixed by agreement. It is admitted that the present defendant had due notice of the action by Coles against the present plaintiff, and was "given an opportunity to come in to defend . . . the same."

The defence is based on the claim that the "injury to Coles was caused in part by the negligence of the railroad corporation itself, and that such an injury is not within the terms of the contract."

By notice and opportunity to defend, the defendant was concluded in any subsequent litigation between the same parties as to all questions determined in the first action which are incident to the right of recovery in the second; and the plaintiff here, who was a defendant there, is likewise concluded as to the facts therein established. If it cannot be ascertained from the record upon what ground damages were recovered in the original suit, parol evidence is admissible to determine whether the issue in controversy in the second case was in fact decided. Issues not actually decided in the prior action are open. *Boston* v. *Worthington,* 10 Gray, 496. *Milford* v. *Holbrook,* 9 Allen, 17. *Campbell* v. *Somerville,* 114 Mass. 334. *Churchill* v. *Holt,* 127 Mass. 165; *S. C.* 131 Mass. 67. *Boston & Maine Railroad* v. *Brackett,* 71 N. H. 494. See also *Cote* v. *New England Navigation Co.* 213 Mass. 177, 181; *Cinamon* v. *St. Louis Rubber Co.* 229 Mass. 33, 37; *Hanzes* v. *Flavio,* 234 Mass. 320.

The case is before us on a case stated, and the material facts are

not in controversy. R. L. c. 165, § 19; c. 173, § 96. St. 1913, c. 716, § 5. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536. *Atlantic Maritime Co.* v. *Gloucester*, 228 Mass. 519, 522.

It appears that: (1) Coles sought to recover for the negligence of the defendant in leaving a stake protruding above the sidewalk of Village Street; also for negligence in leaving it there unprotected and unlighted; (2) the cases in fact were tried on both grounds; (3) the negligence found by the jury consisted in the unprotected condition of the protruding stake, and not in its protrusion; (4) the questions in effect required an answer by the jury as to all the particulars of negligence; and the answers made finally determined that the protrusion of the stake was not negligence; and (5) failure to protect the stake was a breach of duty owed by the defendant to the plaintiff under its contract; and the plaintiff had neither assumed nor attempted to perform this duty.

"The jury, in the finding that the protruding stake was unprotected, assumed and found the contractor was negligent. They could not have found what the negligence was, as they did specifically, unless the contractor's negligence was involved." *Coles* v. *Boston & Maine Railroad*, *supra*, at page 418. It follows that the verdict for Coles against the railroad corporation was rendered solely because of its responsibility to the travelling public for the neglect of the contractor.

As it appears that, as between the plaintiff and the defendant, the only negligence was that of the defendant, and that under the contract the defendant had agreed to "indemnify and save harmless" the plaintiff from all claims on account of any injury caused by its acts or omissions, whether the injury was to property of the defendant or to the servants, passengers and property of the plaintiff, or to the persons and property of others, and that the defendant had due notice and opportunity to defend the action of Coles as plaintiff, the defendant is liable in this case in the agreed sum of $5,000.

The contract under consideration by its terms did not purport to obligate the defendant to indemnify the plaintiff from the consequences of contributory negligence on the part of its employees, as did the undertaking considered in *Woodbury* v. *Post*, 158 Mass. 140; hence that case does not aid the plaintiff. See also *Bay State Street Railway* v. *North Shore News Co.* 224 Mass.

323, where the contract was to the same effect, as it expressly referred to injuries resulting from negligence of the plaintiff's employees. These cases, however, establish the proposition that such an agreement is not void as against public policy. A contract of the nature here involved will not be considered as indemnifying one against his own negligence, or that of his employees, unless its express language requires it. Such an intent must unequivocally appear, and words of general import are not sufficient. It is not to be assumed in the absence of clear stipulation that a contract is to be construed as creating a result so far reaching, and involving consequences which may be so hazardous and momentous. *Perry* v. *Payne*, 217 Penn. St. 252. *Mitchell* v. *Southern Railway*, 124 Ky. 146. *Manhattan Railway* v. *Cornell*, 54 Hun, 292, affirmed without opinion in 130 N. Y. 637. See 14 R. C. L. 47.

The case stated reserves the rights of the defendant under its appeal from an order overruling its demurrer. While ordinarily "the only question open [on a case stated] is, whether the plaintiff can recover in any form of action," the right to insert such a reservation is well settled. *Cushing* v. *Kenfield*, 5 Allen, 307. *Crocker* v. *Boston Electric Light Co.* 180 Mass. 516. *Elliott* v. *Worcester Trust Co.* 189 Mass. 542. "When a case is thus submitted, the plaintiff may amend his writ or declaration in any way necessary to put his case in proper form to support the judgment to which the facts entitle him." *Smith* v. *Carney*, 127 Mass. 179, 181.

The declaration does not set forth a good cause of action in that it contains no allegation to the effect that the injury to Coles was caused by some negligent act of the defendant, for which, as between the parties, the defendant was primarily liable. *Boott Mills* v. *Boston & Maine Railroad*, 218 Mass. 582. See also 40 L. R. A. (N. S.) 1153, note.

The demurrer is here properly on the report of the judge of the Superior Court under R. L. c. 173, § 105, and must be sustained. The plaintiff is given leave to amend; and on the allowance of an amendment in accordance with this opinion, judgment is to be entered for the plaintiff in the sum of $5,000. St. 1913, c. 716, § 3. *Randall* v. *New York, New Haven, & Hartford Railroad*, 226 Mass. 404. *So ordered.*

JOHN J. DALTON *vs.* AMERICAN AMMONIA COMPANY.

Suffolk. March 4, 1920. — May 26, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Performance and breach, Rescission. *Res Judicata. Election. Waiver.*

A merchant agreed in writing in September of a certain year to employ a salesman for a year for a stipulated salary per week and further compensation at the end of the year. The employment was terminated in April and two days later the salesman brought an action against the merchant upon an account annexed containing an item for salary for the week ending at the time of the termination of the employment, and a second and a third item, respectively, for salary for two weeks following the date of the writ. A judge who heard the case ruled that there could be no recovery upon the second and third items for salary and found for the plaintiff upon the first item, judgment was entered and the defendant satisfied an execution which was issued. Thereafter the plaintiff brought a second action, alleging a wrongful discharge and claiming entire damages for breach of the contract. The defendant contended that, by the previous action, the plaintiff had elected to treat the contract as rescinded and therefore that he could not bring the later action upon the contract as still in force. *Held*, that

(1) The plaintiff in neither action elected to treat the contract as terminated;

(2) The two actions were not inconsistent;

(3) The two items in the first action, wherein the plaintiff claimed salary for two weeks succeeding his alleged discharge, did not constitute a decisive election inconsistent with the second action;

(4) Acceptance of satisfaction of the execution issuing on the judgment in the first action did not bar the second action.

CONTRACT for the alleged breach of an agreement in writing to employ the plaintiff as a salesman for one year from September 15, 1913, at a salary of $50 a week and all travelling and other reasonable expenses and a further compensation payable at the end of the term of two hundred and fifty shares of the capital stock of the defendant of the par value of $10 a share. Writ in the Superior Court dated June 8, 1914.

The defendant filed a plea *puis darrein continuance*, setting up that, by reason of the judgment for the plaintiff in the action in the Municipal Court of the City of Boston, described in the opinion, and acceptance and acknowledgment by the plaintiff of satisfaction of an execution issued therein, the plaintiff was estopped

from proceeding further with this action. The plea was heard upon evidence by *Wait*, J., and was overruled; and the defendant appealed.

The defendant then filed an amended answer alleging that the proceedings in the Municipal Court and the judgment therein were *res judicata* of the subject matter of this action.

The case first thereafter was tried before *Bell*, J., who ordered a verdict for the defendant after the jury, in answer to special questions, had found that the plaintiff had failed in his duty toward the defendant in a material respect which was not waived, that the defendant did not discharge the plaintiff on April 11, 1914, and that the question, whether the plaintiff was wrongfully discharged, was not tried in the Municipal Court of the City of Boston. The judge refused to rule, in effect, that a wrongful breach of the contract by the defendant was established by the judgment in the Municipal Court, and ordered a verdict for the defendant. Exceptions by the plaintiff were sustained in an opinion reported in 231 Mass. 430.

The case again was tried before *Quinn*, J. Material facts and contentions of the defendant are described in the opinion. The jury found for the plaintiff in the sum of $4,365.40; and the defendant alleged exceptions.

E. R. Anderson, (*T. J. Casey* with him,) for the defendant.

J. J. Walsh, (*J. F. Lynch* with him,) for the plaintiff.

CARROLL, J. This is an action of contract to recover damages for breach of a written agreement to employ the plaintiff as a salesman from September 15, 1913, to September 15, 1914, at a weekly salary of $50, and further compensation, payable at the end of the term, of two hundred and fifty shares of the capital stock of the defendant corporation at its par value of $10 a share. The writ is dated June 8, 1914. There was evidence that the defendant discharged the plaintiff on April 11, 1914. On April 13 the plaintiff brought an action in the Municipal Court of the City of Boston on an account annexed, — item one being for salary for the week ending April 11, item two for salary to April 18, and item three, salary to April 25 and expenses from March 14 to April 11. The judge found there was due the plaintiff the sum of $50 for salary to April 11, 1914, and $45.78 for expenses. Judgment was entered in the sum of $95.78. Execution issued and was

returned to court, satisfied in full. At the trial of this action the record of the former action was introduced in evidence by the plaintiff.

The defendant filed a plea to dismiss this action because of the former proceedings. At the hearing on the plea evidence was presented which is not reported; the plea was overruled. The plaintiff recovered a verdict of $4,365.40. In *Dalton* v. *American Ammonia Co.* 231 Mass. 430, when the same parties were before this court, it was decided that the judgment of the Municipal Court of the City of Boston was conclusive, that the defendant had broken the contract and had wrongfully discharged the plaintiff. The defendant now contends that as the plaintiff has elected by this action in the Municipal Court to treat the contract as rescinded and has recovered the value of the services actually performed, he cannot pursue an inconsistent remedy and recover damages for the breach, based on the affirmation of the contract.

There is no doubt of the general principle of law that the plaintiff had an election of remedies; and if he chose to treat the contract as ended or rescinded and recovered the value of the work and labor done he could not thereafter consider it as subsisting and recover damages for its breach. Such an action would be inconsistent with his former action, and he must accept the consequences of his assent to the repudiation of the contract by the defendant. *Mullaly* v. *Austin*, 97 Mass. 30. *Daley* v. *People's Building, Loan & Saving Association*, 178 Mass. 13, 17. *Brown* v. *Woodbury*, 183 Mass. 279. *Holman* v. *Updike*, 208 Mass. 466, 471. *Pye* v. *Perry*, 217 Mass. 68, 70. *Bullard* v. *Eames*, 219 Mass. 49, 53. *Goodman* v. *Pocock*, 15 Q. B. 576. Unquestionably the plaintiff could, upon the defendant's breach, have elected to consider the contract ended and have sued upon a *quantum meruit* for the value of his services, and such an election would have precluded him from pursuing a contradictory remedy based on the affirmation of the contract. *Mullaly* v. *Austin, supra.*

The action of debt is abolished in this Commonwealth, R. L. c. 173, § 1, cl. 1, and if the terms of a special contract have been fulfilled so that nothing remains but a duty to pay money, the amount may be recovered under an account annexed. *Hall* v. *Wood*, 9 Gray, 60. *Morse* v. *Sherman*, 106 Mass. 430. *Lovell* v. *Earle*, 127 Mass. 546. By the practice in this Commonwealth,

recovery may be had on an account annexed where the common counts at common law would lie, *Lowe* v. *Pimental*, 115 Mass. 44; and if the defendant repudiates a special contract and unlawfully discharges a servant, the latter may recover upon an account annexed either for the price fixed in the contract or the reasonable worth of the services. *Smith* v. *First Congregational Meetinghouse in Lowell*, 8 Pick. 178. *Van Deusen* v. *Blum*, 18 Pick. 229. *Lowe* v. *Pimental*, *supra*. When such a contract is broken by the defendant without the plaintiff's fault, and the latter, disaffirming the contract and considering it at an end, sues for the value of the services rendered upon a *quantum meruit*, he may recover the full value of his services independent of the contract price, as if the special agreement did not exist; and the contract price is important only as bearing on the true value of the services rendered. *Fitzgerald* v. *Allen*, 128 Mass. 232. *Connolly* v. *Sullivan*, 173 Mass. 1. *Brown* v. *Woodbury*, 183 Mass. 279. *Posner* v. *Seder*, 184 Mass. 331.

The plaintiff recovered in the Municipal Court upon an account annexed for the expenses and the instalments of salary due under the contract. He did not elect by this action to consider the contract as terminated. He relied on it and considered it still in force. He did not in the former action seek to recover for the value of the services independent of the contract price; he recovered the wages due him as wages, or salary, according to the stipulation of the contract; and the action was not inconsistent with the position he now takes in claiming that the contract is still subsisting and that he is entitled to damages for its breach. "The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all." *Connihan* v. *Thompson*, 111 Mass. 270, 272.

The contract provided that the plaintiff was to receive a salary of $50 a week. He could have sued for this claim even if he continued in the employment of the defendant. The defendant on April 11 became his debtor for that amount, and his demand was not inconsistent with the one he now makes, based upon the refusal

of the defendant to carry out the agreement to employ him. It follows that the former action of the plaintiff in enforcing payment of the fixed sum due by the terms of the special contract, is consistent with the position he now takes in claiming damages founded upon the defendant's breach of a valid existing contract, in violation of the plaintiff's rights. *Perry* v. *Dickerson*, 85 N. Y. 345. *Williams* v. *Luckett*, 77 Miss. 394. See *Isaacs* v. *Davies*, 68 Ga. 169; *Allen* v. *Colliery Engineers' Co.* 196 Penn. St. 512; *Liddell* v. *Chidester*, 84 Ala. 508.

The defendant relies on *Olmstead* v. *Henry Bach & Son*, 78 Md. 132, *James* v. *Allen County*, 44 Ohio St. 226, *Doherty* v. *Schipper & Block*, 250 Ill. 128, and *Jones* v. *Dunton*, 7 Ill. App. 580. These cases are distinguishable from the case at bar. In the case first cited, the plaintiff was hired in February, 1892, for the term of one year, at a weekly salary of $50. On April 5 of that year, he was discharged and his wages were paid to April 9. Nine days after his dismissal he sued for and recovered the sum of $50, which judgment was paid. In the subsequent action for the recovery of additional instalments of salary, it was decided that he was barred by the former action, which, it was held, was in effect an action of damages for the breach of the contract. In that case there was no debt due the plaintiff for services rendered. When he began his action he had been paid in full for services performed, and the wages he sought to recover, as well as those sued for in the former action, were not actually earned but were for work and labor which he was ready and willing, but had not been permitted, to perform. The same principle in substance was held to be applicable in the other above mentioned cases. *Jones* v. *Dunton* cites with approval *Howard* v. *Daly*, 61 N. Y. 362, quoting from page 370 of that opinion, when, after stating that a servant wrongfully discharged may treat the contract as continuing and recover for the breach or may rescind and sue for the value of the services performed, states the rule in this language: "These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract."

In *Keedy* v. *Long*, 71 Md. 385, also relied on by the defendant, the appellee sued for damages on account of the wrongful dismissal from employment. She was hired for a year, on or about

September 6, her salary to be paid monthly. On the twenty-eighth of the following month she was discharged. Her salary was paid to October 8. A few days after her dismissal she brought an action before a justice of the peace for the value of her services for twenty days, and recovered judgment which the appellant paid. It was decided that her action in the Justices' Court prevented her from recovering damages for the breach of the contract. The court expressly refused to assent to the rule laid down in *Howard* v. *Daly*, *supra*. In the course of the opinion it was said, at page 394: "Where the master wrongfully discharges the servant, the servant has two alternative remedies for this breach of the contract, and for the recovery of compensation for the services actually rendered, whether rendered up to a date or time fixed in the contract for the payment of a stated instalment of the salary, or whether rendered for a longer or a shorter period; and that the pursuit of one of these remedies will prevent the other from being invoked." So far as *Keedy* v. *Long* is an authority for the doctrine that, when instalments of wages are due to a servant by the terms of a special contract for work actually done and he is wrongfully discharged, if he sues for the recovery of these instalments, he thereby forfeits his claim to recover entire damages for the breach, we must decline to follow it.

Item two of the plaintiff's declaration in the earlier action is for "salary as salesman" to "April 18," and item three, for "salary as salesman" to "April 25." Under his declaration the plaintiff could not recover and did not in fact recover for these items, *Moulton* v. *Trask*, 9 Met. 577, 580, and by merely declaring on them we do not think it can be said that he has made a decisive election inconsistent with his present claim. See, in this connection, *Moulton* v. *Trask*, *supra*; *Miller* v. *Hyde*, 161 Mass. 472; *Frost* v. *Thompson*, 219 Mass. 360, 369.

The defendant contends that the plaintiff's discharge was revoked and bases this contention on the statement of James J. Loughery, the treasurer of the defendant corporation, that on April 11 he told the plaintiff "he would talk with him in Pittsburg; that he was to go there and that he (Loughery) would talk with him there." Loughery denied that he discharged the plaintiff. The previous action settled the question that, when that action was brought on April 13, the plaintiff was then discharged

without right. In view of this fact, the evidence was not important and the defendant's request was refused rightly.

Exceptions overruled.
Order overruling plea affirmed.

SIMON GOLDSMITH *vs.* TRAVELER SHOE COMPANY.

Suffolk. January 12, 1920. — May 27, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Practice, Civil, Election at trial, Exceptions. *Election. Malicious Interference. Actionable Tort.*

Where the trial of an action, founded upon contentions by the plaintiff that the defendant wrongfully occupied premises owned by the plaintiff knowing that by so doing he was preventing the plaintiff from making a lease of them, proceeded, by reason of statements by the plaintiff's counsel and statements by the trial judge assented to or treated with silence and without objection by the plaintiff's counsel, as upon a claim for damages resulting from a malicious interference with the contract of letting about to be executed, and a verdict was ordered for the defendant, it is not open to the plaintiff, upon an exception to the ordering of the verdict, to contend in this court that he was entitled to go to the jury on a claim for trespass.

The owner of a building cannot maintain against a lessee of a portion thereof, who, under a claim of right but wrongfully, is occupying a part of the basement under the premises leased to him, an action for malicious interference, through persistence in wrongful occupancy of the space in the basement, with the making by the owner of a contract of letting of another portion of the building to a third person who required the space for his use, where it appears that the only information that came to the defendant concerning the negotiations of the plaintiff with the third party was of a proposed contract which could not be completed unless the defendant agreed to the relinquishment of certain rights, admittedly his, through certain changes in his lease.

An exception to the exclusion of a question put to a witness will not be sustained where it does not appear what answer to the question was expected.

TORT. Writ dated October 22, 1915.

The declaration contained allegations that on March 25, 1914, and thereafter until the date of the writ in this action, the defendant, without the consent and against the will of the plaintiff, entered and was upon a certain portion of a building belonging to the plaintiff at the corner of Washington Street and Ruggles Street

in Boston, which portion consisted of certain space in the basement partitioned off and used by the defendant as a storeroom for its stock in trade and other things; that the defendant, though requested by the plaintiff to vacate the space, continued to occupy the same; that, while the defendant was occupying the space, the Colonial Amusement Company offered to rent the building for a term of years, provided the space in the basement should be included in the premises leased; that the plaintiff informed the defendant that the plaintiff would be prevented from taking advantage of such offer if the defendant continued to occupy the space in the basement, and that the defendant, knowing and believing, and having reasonable cause to believe, that its occupancy of the space in the basement was wrongful, and knowing that such wrongful occupancy by it was likely to and would prevent the plaintiff from making such lease, wrongfully, maliciously, and unjustifiably, and with the intent and purpose to prevent the plaintiff from making the lease, continued to occupy the space in the basement, and thereby prevented the plaintiff from making such lease.

The action was tried in the Superior Court before *White*, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

S. Sigilman, for the plaintiff, submitted a brief.

A. K. Cohen, (*M. E. Bernkopf* with him,) for the defendant.

CARROLL, J. On March 12, 1913, by a decree entered in a suit in equity brought by the defendant against Henry A. Koch and others, the defendant acquired a leasehold interest in the building at the corner of Washington and Ruggles streets in the Roxbury district of Boston. The lease was not executed as required by the decree, and within twenty days from its date a certified copy of the instrument annexed to the decree was filed in the registry of deeds. *Traveler Shoe Co.* v. *Koch*, 216 Mass. 412. The lease provided that the lessors were to furnish "light, heat, elevator service and space." The defendant went into occupation of the premises and took possession of certain space in the basement which it used as a store room. On March 24, 1914, Goldsmith, the plaintiff, brought a suit in equity against the defendant, alleging that it was a trespasser in occupying this space. In the Supe-

rior Court, on June 14, 1914, a decree was entered for the plaintiff, and the defendant appealed. In the Supreme Judicial Court the decree was affirmed and a final decree was entered on July 21, 1915. The defendant paid the damages and costs awarded. See *Goldsmith* v. *Traveler Shoe Co.* 221 Mass. 482.

There was evidence that from January to August, 1914, negotiations were carried on between the plaintiff and the Colonial Amusement Company (hereafter called the Company) respecting the lease of the entire building, a part of which was to be used as a theatre, the parties contemplating a lease for the term of twenty years, at an annual rental of $20,000, to begin on September 1, 1914; and that a written agreement to this effect was drawn up but was not signed. In August, 1914, after the decree had been entered in the Superior Court in favor of Goldsmith and it was learned that the defendant had appealed, negotiations were ended, the lease was not executed, and subsequently a lease of the building was made to a third party at a much lower rental.

Thereupon this action of tort was brought by the plaintiff, alleging that the defendant continued wrongfully to occupy the space in the basement which was a part of the premises to be leased to the Company; that the defendant was informed that, if it did not vacate, the plaintiff could not take advantage of the proposal made by the Company; that, with knowledge of this fact, with the intent to hinder the plaintiff from leasing the building, the defendant continued its occupation and thereby prevented the plaintiff from carrying out the proposed agreement with the Company.

The plaintiff contends he can recover damages because of the continuation of the trespass after March 24, 1914, — the date of the suit in equity of *Goldsmith* v. *Traveler Shoe Co.*, *supra*, and also because the defendant wrongfully and maliciously prevented him from making the lease to the Company. In the Superior Court by order of the trial judge a verdict was entered for the defendant, and the plaintiff excepted.

1. The trial proceeded on the ground that the plaintiff was seeking to recover damages because of the defendant's malicious interference with the contract about to be executed with the Company. It was understood that for this reason alone damages were sought and no question of trespass was brought to the court's

attention. At the beginning of the trial the defendant's counsel stated he assumed the plaintiff sought to recover for the interference with the plaintiff's contract rights and that no claim was made for damages by trespass. After the plaintiff's counsel stated his claim, the judge said that under the declaration the plaintiff could recover for malicious interference with the contract he was about to make. To this the plaintiff apparently assented. No objection was made by him and it was not suggested that he expected to recover for any other cause except that stated by the judge. During the course of the trial statements were made by the judge indicating that the only basis upon which recovery was sought was the interference with the contract, and nothing was said to correct this understanding. At the close of the evidence the judge in allowing the defendant's motion that a verdict be ordered for it, said that the only question open was the malicious interference with the unexecuted contract and that the evidence was insufficient to support a finding for the plaintiff. To this statement no objection was made, the plaintiff merely excepting to the allowance of the defendant's motion. The question of the defendant's trespass and the right to recover therefor is not now open to the plaintiff. *Edwards* v. *Carr*, 13 Gray, 234, 238. *Lafrance* v. *Desautels*, 225 Mass. 324, 328, and cases cited.

2. The plaintiff contends that there was evidence that the defendant knew of the proposed lease from the plaintiff to the Company, and by continuing to occupy the space in the basement, prevented its execution. The defendant contended that under the terms of the lease it was to be supplied with room in the basement and that the space occupied by it was enclosed by uprights and a wire netting erected by one of the lessors who pointed out this place to the defendant for its use. It was found that the permission to occupy this portion of the basement was a license, and revocable, and it was decided that the word "space" was too indefinite to pass as part of the demised premises any inclosure in the basement. While the defendant was in possession of this portion of the basement, claiming to hold under the express provisions of the lease and the agreement made with one of the lessors, the plaintiff began negotiations for the lease of the entire building to the Company, the lessee desiring to use a portion for a theatre. It was claimed that the section of the rear of the base-

ment held by the defendant came directly under the stage, and that to carry out the plan of the lessee it was necessary to have the exclusive control of the rear of the basement, including the part occupied by the defendant.

The building was constructed for use as a department store, with a single passageway, leading to the different departments, from which there was an entrance to the defendant's store. The defendant's lease provided that the northeasterly portion of the premises was along the centre of this aisle or passageway and it was to be kept open for the use of the lessee and the other tenants, "as it now exists." One of the parties who was interested in securing the lease from Goldsmith testified, "that if they could have got the basement they would have signed the lease anyway and then arranged the location on the first floor." He admitted, however, that the proposed changes would have to be made according to the building laws of Boston, requiring the construction of a fire wall which would wholly separate the defendant's store from the other parts of the building. The building could not, according to the evidence of the architect, be used for a theatre without closing the entrance to the defendant's store from the passageway and taking away its display window. The changes involved the opening of a new entrance on Washington Street, constructing a stairway from the store to the front of the basement, and in other ways depriving it of its leasehold interest.

No contract between the plaintiff and the Company was executed. The parties were merely arranging the terms of a proposed contract. The only information given the defendant that it was interfering with the completion thereof came from an agent of the plaintiff, who sought to make an agreement with the defendant so that the proposed contract could be carried out. The witness understood that in order to do this a separate entrance would be made on Washington Street to take the place of the entrance from the passageway, a stairway constructed from the store to the basement, and the store shut off from the remainder of the building.

The defendant was in occupation of the basement before the plaintiff and the Company began to treat with each other, and held the premises, as it supposed, under a lease. Its rights were then in litigation and were not finally determined. Without con-

sidering whether there was any evidence that the defendant's acts under the facts disclosed were malicious or caused the abandonment of the proposed contract (see *Beekman* v. *Marsters*, 195 Mass. 205) and without deciding the other objections to the plaintiff's right to recover (see *Butterfield* v. *Ashley*, 6 Cush. 249; *S. C.* 2 Gray, 254), it is sufficient to say that the defendant had no knowledge that the mere possession of the basement would result in injury to the plaintiff's contract rights. In order to show that the defendant maliciously prevented the performance of the agreement between the plaintiff and the Company, it was essential to prove that it had knowledge of the contract in question. As stated in *McGurk* v. *Cronenwett*, 199 Mass. 457, 461, "A defendant who has not been guilty of conduct otherwise actionable ought not to be held liable for having brought about, though wrongfully and without cause, the breach of a contract of which he had no knowledge." See *Morgan* v. *Smith*, 77 N. C. 37. The only information that came to the defendant concerning the negotiations of the plaintiff and the Company, was of a proposed contract which could not be completed unless the defendant agreed to certain changes in its lease. Its consent to these changes was essential, and without it the agreement could not be executed. This was the only contract which was called to its attention and of which it had any knowledge, and it had no notice that the mere retention of storage space in the basement would interfere with the proposed contract. In these circumstances, by refusing to agree with the plaintiff to a change in the lease, and in refusing to surrender its rights thereunder, there was nothing to show that it maliciously prevented the fulfilment of the contract or maliciously interfered with the plaintiff's rights.

3. Certain questions were put by the plaintiff which were excluded. No offer was made showing the answer expected. It does not appear that the plaintiff was in any way prejudiced by this exclusion. *Lee* v. *Tarplin*, 183 Mass. 52, 54. *Bachant* v. *Boston & Maine Railroad*, 187 Mass. 392, 396.

Exceptions overruled.

ALLAN A. HOOKER *vs.* AUGUSTUS D. McLENNAN & another.

Suffolk. March 29, 1920. — June 4, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, To reach and apply property not attachable at law. *Trustee Process. Attachment. Municipal Corporations*, Officers and agents.

Where a claim of a municipal officer to compensation for his services is based, not merely on a statutory provision but also upon an enforceable obligation of the corporation, although that obligation is one entered into under statutory authority or direction, such claim in legal effect is upon an express contract and an amount so due may be attached in an action by trustee process against the officer as defendant and the municipality as trustee. *Walker* v. *Cook*, 129 Mass. 577, distinguished.

A bill in equity under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, cannot be maintained to reach and apply, in payment of a debt due to the plaintiff from the principal defendant, salary due to that defendant as first assistant assessor of taxes of the city of Boston, such salary being attachable by trustee process.

BILL IN EQUITY, filed in the Superior Court on April 22, 1919, against Augustus D. McLennan (hereinafter called the defendant) and the city of Boston, to reach and apply in payment of a debt owed to the plaintiff by the defendant $200 alleged to be due to the defendant from the city of Boston "as salary for the office of first assistant assessor."

The defendant demurred to the bill on the following grounds:

"1. That the defendant is an assistant assessor of the city of Boston and is therefore a public officer; that the money or amount alleged due or to become due and payable to the said assessor, if any, from the city of Boston is due or to become due to him for services rendered as such assistant assessor; that the city of Boston cannot be legally held as trustee in said action.

"2. That such action is in contravention of the statutes and laws of this Commonwealth, and the plaintiff cannot maintain this action either in law or in equity."

The demurrer was sustained and a final decree was entered by order of *Wait*, J. The plaintiff appealed.

The case was submitted on briefs.

S. R. Cutler & H. W. James, for the plaintiff.

J. S. Richardson, for the defendant.

JENNEY, J. The plaintiff seeks to reach and apply an amount due at the time of the filing of the bill from the city of Boston to Augustus D. McLennan, hereinafter called the defendant. The city also is a party defendant. The case is before us on the plaintiff's appeal from the final decree sustaining the demurrer of the defendant and dismissing the bill. The plaintiff, who seeks a decree establishing the indebtedness of the defendant to him on two promissory notes, is within the statute so far as his claim is concerned. *H. G. Kilbourne Co.* v. *Standard Stamp Affixer Co.* 216 Mass. 118. Under the statute, that which can be sequestrated is "any property, right, title or interest, legal or equitable, of a debtor, within or without this Commonwealth, which cannot be reached to be attached or taken on execution in an action at law." R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2.

It is admitted by the demurrer that when the bill was filed, there was due and payable to the defendant from the city of Boston $200 "as salary for the office of first assistant assessor of said city." If said amount could have been held by an attachment by trustee process (R. L. c. 189), the bill cannot be maintained. It was decided in *Walker* v. *Cook*, 129 Mass. 577, that the statutory compensation which assessors are entitled to receive where no other compensation has been allowed by the town is not the subject of attachment by trustee process, because the right to recover compensation as determined by statute does not depend on any contract express or implied. The language used in *Williams* v. *Boardman*, 9 Allen, 570, 571, was quoted with approval. It was there said that "to constitute the relation of trustee, there must be a privity of contract, express or implied, between the principal debtor in the trustee process and him who is sought to be charged as his trustee, unless there be a statute provision that renders such privity unnecessary."

Walker v. *Cook*, *supra*, was not posited on the ground that public policy forbade the application through legal process of funds held by a municipal corporation to an indebtedness arising through the exercise of governmental functions. See 12 R. C. L. 843. It had already been decided that a county could be summoned as

trustee because of compensation due a messenger having charge of its court house. This court had said: "In such a state of things, there has never been a doubt that cities and towns are liable to be summoned as trustees, and we find nothing in any of the statutes upon this subject that places counties upon a different footing in this respect from cities and towns." *Adams* v. *Tyler*, 121 Mass. 380, 381. See also *Donohue* v. *Newburyport*, 211 Mass. 561, 568, where it was said: "The conclusion that 'corporation' as used in statutes relating to trustee process included cities and towns was reached in *Adams* v. *Tyler*, 121 Mass. 380, purely upon historical considerations arising from a recommendation of commissioners on Revision of the Statutes rejected by the Legislature." *Walker* v. *Cook*, *supra*, does not decide that money due a defendant on a contract, express or implied, as distinguished from a purely statutory obligation, cannot be attached by trustee process. Indeed *Adams* v. *Tyler*, *supra*, was a decision to the contrary, and, although cited, it was not distinguished nor limited. See *Travelers Ins. Co.* v. *Maguire*, 218 Mass. 360, 362.

In the case at bar, the amount was due and payable as salary. Salary in this connection indicates "a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered." *Benedict* v. *United States*, 176 U. S. 357, 360.

St. 1913, c. 835, § 400, provides that a town at its annual meeting shall elect three or more assessors, "and, if the town so votes, three or more assistant assessors." By St. 1909, c. 490, Part I, § 99, the compensation of an assessor is fixed at "two dollars and fifty cents a day for every whole day in which he is employed in that service, and such additional compensation as the city or town shall allow." No statutory provision is made for any payment to assistant assessors for their services. Under R. L. c. 25, § 95, however, towns may determine the amount of compensation of their officers unless otherwise provided by law. *Welch* v. *Emerson*, 206 Mass. 129. All statutes relating to towns apply to cities so far as consistent with general or special laws relative thereto. R. L. c. 26, § 2.

In this Commonwealth, the right of a public officer to compensation, although statutory, can be assigned before the services have been fully performed. *Brackett* v. *Blake*, 7 Met. 335. *Citi-*

zens Loan Association v. *Boston & Maine Railroad*, 196 Mass. 528. Such a right is property. See *Alexander* v. *McPeck*, 189 Mass. 34, 43. While this rule does not prevail in many jurisdictions, it is generally held that there is no objection to an assignment of the right to receive salary or other compensation from a municipality where the transfer is not anticipatory. See cases collected in 2 R. C. L. 605, and 5 C. J. 872. See also *Stimpson* v. *Malden*, 109 Mass. 313. Compensation due and payable to a municipal officer may be recovered in an action of contract. Where such officer bases his right to recompense, not merely on a statutory provision, but upon an enforceable obligation of a municipal corporation, although one entered into under statutory authority or direction, we think that the claim is one which in legal effect is upon an express contract, and that the amount so payable may be attached by trustee process. The action of a municipality in fixing the compensation of an officer or employee by vote or other appropriate proceeding renders it liable on the obligation so created. *Nelson* v. *Milford*, 7 Pick. 18. *Kimball* v. *Salem*, 111 Mass. 87. *Parks* v. *Waltham*, 120 Mass. 160. Compare *Cook* v. *Springfield*, 184 Mass. 247. *Milford* v. *Commonwealth*, 144 Mass. 64, is not to the contrary. It was there held that a suit upon an obligation resting wholly on a statute was not a claim "which is founded upon a contract for the payment of money" within the meaning of the statute then existing as to jurisdiction in an action against the Commonwealth, because the obligation arose purely *ex lege*. See *McCann* v. *Randall*, 147 Mass. 81, 89; *Murdock Parlor Grate Co.* v. *Commonwealth*, 152 Mass. 28; *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137, 138.

If we should take judicial notice of the special statute relating to assessors in the city of Boston (see *Prince* v. *Crocker*, 166 Mass. 347, 349), the same result is reached. Spec. St. 1918, c. 93, § 4, provides that "The board of assessors may, subject to the approval of the mayor, appoint and remove such assistant assessors as the work of the department requires, and each assistant assessor shall receive annually a sum not exceeding twelve hundred dollars as compensation for such services as the board of assessors may prescribe." Under this statute the determination of the amount which such assessors shall receive is a condition of liability. *Walker* v. *Cook*, *supra*. When, however, the compensation is

fixed, the situation is precisely the same as under the general law, so far as the question here involved.

It follows that the demurrer was sustained rightly, because the plaintiff on the facts alleged could have made an effectual attachment by trustee process. *Venable* v. *Rickenberg*, 152 Mass. 64. *Haman* v. *Brennan*, 170 Mass. 405, 407. The decree of the Superior Court must be affirmed with costs of the appeal.

Ordered accordingly.

MORTON ADAMS *vs.* EAST BOSTON COMPANY.
JOHN C. WATSON *vs.* SAME.

Suffolk. March 1, 1920. — June 5, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Validity. *Corporation*, Officers and agents. *General Court*. *Agency*, Agent improperly influencing legislation, Compensation.

Where the facts are not in dispute, the question, whether a contract is unenforceable because contrary to public policy, is a question of law under all the circumstances of the particular case.

The directors of a corporation owning a very large tract of marsh lands and flats covered by tide water in close proximity to the main ship channel of Boston Harbor, which under suitable development could be filled and adapted for the construction of docks and for other commercial purposes, well knowing that no private purchaser of the property ever could be obtained, authorized its president and its treasurer "to take any and all such measures as they may deem advisable for the purpose of effecting a sale or other disposition of any part or parts of the" property, including a taking thereof by public authorities by eminent domain, they to be given a commission of fifteen per cent in addition to their salaries as officers. Through the efforts of these agents in bringing the matter before public men and public organizations, the matter was brought to the attention of the Legislature and St. 1895, c. 291, was enacted, providing for a board of dock and terminal facilities, whose report was filed in January, 1897. Previous to the election of the Legislature of 1897, the agents conducted a systematic campaign to reach members elect of the House of Representatives not only to pledge them to support a bill favoring a taking of the property by the Commonwealth, but also to vote for a speaker whom they suggested or represented to be favorable to the bill and who also would have the power to appoint a committee in the House, to which the bill and the report of the board would be referred and whose members would be inclined to consider favorably the question of public ownership of the property. By authority of a vote of the directors, upon which neither of the agents voted and which afterwards was ratified by a vote

of the stockholders, a contract in writing was made by the corporation with the agents under date May 21, 1897, providing for the same commission as that previously specified to be paid to the agents "in compensation for their services rendered and to be rendered in connection with the sale" of the property, the agents agreeing to "use their best efforts . . . to dispose of said" property, and to accept the stipulated commission "as full compensation for their services under this agreement and for like services previously rendered at the request of, or by agreement with, the directors of the company." Twenty days later St. 1897, c. 486, was enacted, under the authority of which the board of harbor and land commissioners took the property in question by eminent domain. An amount later having been paid by the Commonwealth for the property, the agents brought actions against the corporation for their commissions, in which it was *held*, that

(1) The contract dated May 21, 1897, was not invalid on its face;

(2) The contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom the proposed statute was to be presented, and therefore was unenforceable because contrary to public policy;

(3) It is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts, inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity.

TWO ACTIONS OF CONTRACT, upon the agreements in writing described in the opinion, for compensation for services alleged to have been performed by one Charles E. Adams (the assignor of the plaintiff in the first action) and by the plaintiff in the second action relating to the procuring by the defendant of compensation for certain lands and flats taken by the Commonwealth by eminent domain. Writs dated September 22, 1916.

In the Superior Court the actions were tried together before *White*, J. It appeared that the defendant's directors on October 4 and November 1, 1894, and on February 6, 1896, previous to the authorization and making of the first contract described in the opinion, voted that John C. Watson and Charles E. Adams, be "authorized to take any and all such measures as they may deem advisable for the purpose of effecting a sale or other disposition of any part or parts of the" land and flats in question, their compensation being fixed in the vote of October 4, 1894, at ten per cent and in the vote of February 6, 1896, at fifteen per cent commission, and to be in addition to any salary paid them as president and treasurer. The vote of November 1, 1894, specifically provided that the "vote dated October 4, 1894, relating to compensation . . . in case a sale . . . shall be effected was intended to include

and apply to any disposal thereof by the taking of said flats by any public authority by exercising the right of eminent domain."

Thereafter, largely through the efforts of Watson and Adams in bringing the question before public men and public organizations, hearings were had in the Legislature and St. 1895, c. 291, was enacted, providing for the appointment of a board of dock and terminal facilities. This board reported in January, 1897.

Other material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked, among others, for the following rulings:

"6. The alleged contract of May 21, 1897, a copy of which is annexed to the declaration . . . was invalid because it was contrary to public policy.

"7. The alleged agreement of modification of the contract of May 21, 1897, a copy of which is annexed to the declaration . . . was invalid because it was contrary to public policy.

"8. The evidence will not warrant a finding by the jury that the alleged agreement of January 23, 1900, a copy of which is annexed to the declaration . . . was made in good faith and with such regard for the interests of the defendant company on the part of its directors and officers as to make it a binding contract of the company."

"20. If the plaintiffs, or either of them, sought through personal solicitation or request, by letter or otherwise, to persuade any member of the State Legislature to support legislation which would authorize the harbor and land commissioners to purchase or take by eminent domain any of the defendant's flats, the plaintiffs cannot recover in this action.

"21. If the plaintiffs, or either of them, sought through personal solicitation or request, by letter or otherwise, to persuade the board of harbor and land commissioners or any member of said board to act in favor of a taking of the defendant's flats by eminent domain, then the plaintiffs cannot recover in this action."

The rulings were refused. The jury found for the plaintiff in each action in the sum of $14,398.46; and the defendant alleged exceptions.

G. L. Mayberry, (*L. A. Mayberry* with him,) for the defendant.

W. A. Dane, (*F. Hoitt* with him,) for the plaintiffs.

BRALEY, J. The alleged cause of action rests on the contracts copies of which, annexed to the declaration, in so far as material read as follows:

The first contract: "Said Company agrees to pay to said John C. Watson and Charles E. Adams in compensation for their services rendered and to be rendered in connection with the sale of its flats and marsh lands, and in addition to the salaries paid to them as officers of the Company, fifteen (15) per cent of the proceeds of any sale or sales consummated before January 1st, 1900, but all other commissions and expenses incurred in connection with said sale shall be paid out of said fifteen per cent and deducted therefrom.

"Said Watson and Adams in consideration of the foregoing agreement agree to use their best efforts during said period to dispose of said marsh lands and flats, and to accept said commission as full compensation for their services under this agreement and for like services previously rendered at the request of, or by agreement with, the directors of the Company.

"No sale shall be deemed to be consummated within said period within the meaning of this agreement unless a written contract therefor has been entered into by the corporation with a responsible party or parties, and no such contract shall be made on behalf of the corporation except by vote of the directors. But if at the expiration of said period negotiations for a sale are going on and if through the efforts of said Watson and Adams said sale, for which negotiations were going on as aforesaid, is consummated prior to January 1, 1901, they shall be entitled to a commission as aforesaid thereon.

"In case a sale is consummated upon which said Watson and Adams are entitled to commissions, but payment is postponed or delayed, the commissions of said Watson and Adams shall not be payable upon any part of the purchase money until such part of the purchase money is received by the corporation.

"In case any of the marsh lands or flats included in this agreement should be taken by right of eminent domain prior to January 1, 1900, said Watson and Adams shall be entitled to a commission as aforesaid on all sums received by the corporation on account of said taking when such sums are received.

"One-half of said commission of fifteen (15) per cent shall be paid to each of said parties, his representatives or assigns."

The second contract: "Whereas the Commonwealth, by action of the Board of Harbor and Land Commissioners, has taken a portion of the flats belonging to East Boston Company as contemplated in and by the vote of this Board dated May 8th, 1899, amended by vote of Nov. 2, 1899, and the contract pursuant to said vote of May 6th with John C. Watson and C. E. Adams and said Board has made an award of damages for such taking that said Company deems inadequate and that is not satisfactory and said Company has petitioned the Superior Court for a revision of such award and to ascertain and fix the damages for such taking, whereby the East Boston Company incurs and becomes liable to pay the charges, costs and expenses of litigation in prosecuting said petition not contemplated by said vote and contract, therefore

"Voted, That in consideration of the premises it is hereby agreed by and between the said Watson and Adams and this corporation that the rate of compensation which they are entitled to receive according to and on account of said taking of said portion of said flats be and is hereby altered and reduced from fifteen per cent of the amount which the East Boston Company shall receive for said taking to ten per cent of such amount.

"And Mr. George B. James is hereby authorized and instructed to execute for and in the name of East Boston Company an agreement with the said Watson and Adams in accordance with this vote and to be executed also by them."

The first agreement is dated May 21, 1897, and although the second agreement is undated, the record shows that it was executed shortly after January 23, 1900.

The parties plaintiff will be referred to as if the action first named had been brought in the name of Charles E. Adams, who assigned his claim to Morton Adams for whose sole benefit it is prosecuted, and the contract will be considered as the agreement shown by the first instrument, for the second instrument, while affirming the agreement, relates to the modification of the commission.

The defendant owned a very large area or tract of marsh lands and flats covered by tide water in close proximity to the main ship channel of the harbor of Boston, which under suitable development could be filled and adapted for the construction of docks and other commercial purposes. The company under previous arrange-

ments with the plaintiffs had endeavored to sell but no purchaser appears to have been found or secured, and it had become substantially certain that, if a sale were to be effected, special agents must be selected who, by reason of concentration of effort as well as skill and ability and induced by the offer of liberal compensation, would undertake the task of procuring a purchaser financially able and willing to buy.

The defendant asked the trial judge to rule that the evidence did not warrant a finding that the agreement of January 23, 1900, was made in good faith and with such regard for the interests of the corporation by its directors and officers as to constitute a binding contract. While Watson was president and a director and Adams was clerk and treasurer of the corporation, each owning a large number of shares, Watson refrained from voting when the proposed contract was mooted, and the vote authorizing it was passed unanimously by the other members who constituted a majority of the board. And on May 7, 1900, the stockholders at a meeting duly called unanimously voted, "that all the acts and doings of the Company's directors and officers in the conduct of the general business of the Company be and are hereby ratified and confirmed."

The record leaves no doubt, nor do the parties contend, that any private purchaser could be or ever was obtained. But after the enactment of St. 1897, c. 486, approved June 10, 1897, to take effect upon its passage, entitled "An Act to secure public ownership and control of certain portions of the foreshore of Boston Harbor," the board of harbor and land commissioners acting under § 1 of the statute, and in conformity therewith, took on October 28, 1898, in fee certain portions of the flats as described in the taking, which was duly recorded as required by law. The company and the board having failed to agree upon damages, counsel were employed to protect the rights of the defendant. While it is contended that the taking was invalid, the subsequent transactions between the company and the Commonwealth show that the directors of the port of Boston acting under the subsequent St. of 1911, c. 748, § 4, an act relative to the port of Boston, made on November 20, 1913, a taking in fee of the defendant's flats in the rear of the flats comprised in the alleged first taking. By the agreement of July 26, 1916, and without the assent of the plain-

tiffs, a round sum of more than half a million dollars was paid to the company for the flats or lands covered by each taking. It is plain that the last extension of time by the company for performance having terminated January 1, 1911, the plaintiffs if they can recover are entitled to a commission only on the amount received for the first taking.

The defendant petitioned for damages under the statute and, after the passage of St. 1913, c. 624, permitting the Commonwealth to be impleaded in writs of entry, brought an action to try title and to recover possession, claiming that the statute was unconstitutional because no provision was made for adequate compensation. It appears that, an adjustment of all matters in dispute having been effected, the defendant remised, released and forever quitclaimed to the Commonwealth a parcel of land and flats specifically described, "meaning and intending hereby to convey all the right, title and interest of the said East Boston Company in and to all its lands and flats included within the lines of the description set forth in the taking made by the board of harbor and land commissioners acting in behalf of said Commonwealth of Massachusetts on the twenty-eighth day of October 1896. . . ." And thereupon the petition to recover damages was disposed of by the entry of "judgment for the petitioner for one dollar without costs and judgment satisfied in full," and, in the writ of entry "judgment for the tenant without costs."

But even if it be assumed that the defendant is bound by the contract and that the jury under appropriate instructions would have been warranted in finding that the alleged unconstitutionality of the statute had been waived, and that the amount received for the first taking could have been substantially ascertained and the commission computed, the defendant also contends, and asked the judge to rule that the contract of May 21, 1897, was invalid because it was contrary to public policy, and that on all the evidence the plaintiffs could not recover.

Where the facts are not in dispute, the question, whether a contract is against public policy, is a question of law under all the circumstances of the particular case. *Weber* v. *Shay & Cogan*, 56 Ohio St. 116. *Egerton* v. *Brownlow*, 4 H. L. Cas. 1.

When the contract was executed, the Legislature was in session before which the measure was pending, upon the report of the

commissioners, which in twenty days thereafter became St. 1897, c. 486. It was thoroughly understood by the parties that, unless the statute was enacted, the defendant could not reasonably expect to dispose of its property and the plaintiffs would not be entitled to any commission. The ownership must be acquired by the Commonwealth, or the whole project after a long period of exploitation and of strenuous effort would fail. If not expressly conceded, the uncontradicted evidence introduced by the plaintiffs is conclusive, that they had been conducting a systematic campaign before the session began to reach members elect of the House of Representatives not only to support the proposed bill, but to vote for a candidate for speaker whom they suggested or represented as being favorable to it, and who also would have the power to appoint a committee on the part of the House whose members would be inclined to consider favorably the question of public ownership of the flats.

The contract on its face however shows no tendency to injure the public. Payment of the commission is conditioned upon the success of the plaintiffs if achieved by legitimate means. *Kerr* v. *American Pneumatic Service Co.* 188 Mass. 27. And a demurrer to the declaration could not have been sustained. *Barry* v. *Capen,* 151 Mass. 99, 100.

The plaintiffs, as well as the defendant by its officers, had the undoubted right to urge before legislative committees either in person or by counsel, or by those interested in their behalf, the passage of the proposed act. But if the real purpose of the company was to obtain, and of the plaintiffs to render, services which in any manner depended on their success in the use directly or indirectly of improper influence or practices upon members of the Legislature to whom the proposed statute must be presented, or had been presented, the contract comes within the principles so elaborately pointed out in *Fuller* v. *Dame,* 18 Pick. 472, and is unenforceable. *Beers* v. *Wardwell,* 198 Mass. 236. *Baltimore & Ohio Southwestern Railway* v. *Voigt,* 176 U. S. 498, 505. It is of no consequence that eventually there does not appear to have been any actual harm to the public. The test is, whether the underlying tendency of the contract under the conditions described was manifestly injurious to the public interest and welfare. *Meguire* v. *Corwine,* 101 U. S. 108. It is not necessary that the parties should

stipulate for corrupt action to be procured or induced by bribery, or the promise of future monetary gain, or the emolument of office. It is sufficient if the contract, when applied to the facts, inevitably tends to results which impair not merely the character of the Legislature, but the public confidence in its integrity. The question, whether the flats should be acquired for the public benefit, rested solely in the determination of the Legislature whose members were bound to exercise their judgment uninfluenced by extraneous considerations, whether arising from motives of friendship, or the desire to benefit or subserve directly or indirectly private interests under whatever guise they might assume. And the distinction as we have said is obvious between solicitation or influence exerted to secure legislation, and legitimate services to enable legislators to understand the merits of measures upon which they are called to pass. *Davis* v. *Commonwealth*, 164 Mass. 241. *Trist* v. *Child*, 21 Wall. 441.

The consideration which the plaintiffs were to receive not only is single, but depended upon, and was measured by, what they had unlawfully done and, if necessary, were to continue to do as an indivisible transaction until success ultimately should crown their efforts. *Kennedy* v. *Welch*, 196 Mass. 592. *Hazelton* v. *Sheckells*, 202 U. S. 71.

We are therefore of opinion that the rulings should have been given. *Frost* v. *Belmont*, 6 Allen, 152, 159. *Pratt* v. *Foot*, 6 Conn. 332. *Buck* v. *First National Bank of Paw Paw*, 27 Mich. 293. *Houlton* v. *Dunn*, 60 Minn. 26. *Mills* v. *Mills*, 40 N. Y. 543. *Spalding* v. *Ewing*, 149 Penn. St. 375. *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314. *Tool Co.* v. *Norris*, 2 Wall. 45. *Trist* v. *Child*, 21 Wall. 441. 6 R. C. L. Contracts, § 138, and cases cited in note 15. St. 1890, c. 456, § 3, as amended by St. 1891, c. 223, now R. L. c. 3, §§ 23–32. The exceptions must be sustained, and judgment in each case entered for the defendant. St. 1909, c. 236, § 1.

So ordered.

JOHN W. SULLIVAN *vs.* HENRY D. CHADWICK.

Hampden. February 24, 1920. — June 9, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Negligence, Imputed, Due care of child, In use of highway. *Parent and Child. Evidence*, Presumptions and burden of proof.

Although a boy three years and nine months of age, who lives with his father and mother, a younger child and his mother's mother in a house upon a city street sixty feet in width, which formed the main avenue between populous cities and over which passed one hundred motor vehicles each hour and the street cars of seven different lines upon double tracks, is bright and careful in his habit of crossing a street, it must be presumed as a matter of law that he does not possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care exercised by his parents, by the provisions of St. 1914, c. 553.

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances.

If a boy three years and nine months of age leaves a sidewalk in a city twenty feet from the end of a bridge one hundred feet long at a point where by an abutment of the bridge he is hidden from the view of vehicles approaching from the other end of the bridge, and runs or "jogs" into the street only a few feet in front of an approaching motor car, which runs into and injures him, he must be found not to have been in the exercise of the due care required of an ordinarily prudent adult person under the circumstances, and, where it further appears that he was upon the highway unattended by reason of negligence of his parents, he is precluded from recovery for his injuries.

Where, in an action of tort for personal injuries, upon a view of the evidence most favorable to the plaintiff, a finding must be made that the plaintiff was negligent, the plaintiff is not aided by the provisions of St. 1914, c. 553, and a verdict should be ordered for the defendant.

TORT for personal injuries suffered on May 10, 1917, by a boy then three years and nine months of age, when he was run into at the easterly end of the Plainfield Street bridge in Springfield

by a motor car driven by the defendant. Writ dated August 10, 1917.

In the Superior Court the action was tried before *Callahan*, J. Material evidence is described in the opinion. The defendant requested the following rulings of law:

"1. Upon all the evidence the plaintiff cannot recover.

"2. In order to recover against the defendant, the plaintiff must maintain the burden of proof of the proposition that he was in the exercise of due care.

"3. There is no presumption that the person in charge of the plaintiff at the time of the accident was in the exercise of due care.

"4. St. 1914, c. 553, raises no presumption that the plaintiff was in the exercise of due care at the time of the accident.

"5. If the plaintiff, unmindful of his safety, ran from the sidewalk to the Plainfield Street bridge directly in the path of the defendant's automobile and was injured, he was negligent and cannot recover.

"6. Unless the plaintiff was of sufficient age, capacity and intelligence to be properly permitted by his parents to cross such a street as Plainfield Street alone, he cannot recover.

"7. If the plaintiff was of sufficient age, capacity and intelligence to be properly permitted to cross such a street as Plainfield Street alone, he was bound to take some active precaution for his safety in so crossing.

"8. If the plaintiff took no active precautions for his safety in crossing Plainfield Street, he cannot recover.

"9. There is no evidence that the plaintiff took any precautions for his own safety in crossing Plainfield Street."

The judge refused the first, second, fourth and ninth rulings requested, gave the third and sixth rulings as requested, and as to the fifth, seventh and eighth rulings, charged the jury in substance as follows:

"Now, what is the rule of law as to his [the plaintiff's] care in that situation? It is, what I stated some time ago, this: He must be in the exercise of that degree of care which a child of his age, his experience, his intelligence, and his alertness would exercise if he found himself in the same situation, confronted by a similar peril.

"And on that issue you are first to determine all the facts of the

accident itself. How did it happen? How did the boy leave the sidewalk in order to cross the street? Where was he going? Was he on his way to his own home on Birnie Avenue? If he was, he had a right to cross the street for the purpose of going to his home on Plainfield Street. How did he enter the street itself as distinguished from the sidewalk? Did he run or did he jog along? I have forgotten what the testimony was on that point. What do you say about it? And if he did, was that in and of itself a negligent act on the part of a child of his age, experience and intelligence? You are to say.

"Ordinarily for an adult to run out upon a highway without looking one way or the other to see whether vehicles were coming would be negligence, which would preclude him from recovering. That is not necessarily so, as a matter of law, in the case of a child of this age, experience and intelligence. It is a question of fact for you to determine.

"Now, what would you say was the duty of that child, measuring his duty from his age and experience and his intelligence, as he undertook to cross that street? In running out in that way, if he ran as claimed by the defendant, was it the negligent act of such a child, or was it in the circumstances a careful act? Was the boy, in that particular situation, in that particular place, doing that which a child of his years would think to be a prudent thing, to run quickly across the street to go to his home? . . .

"Now, if the boy, merely because he wished to get home quickly, was wholly unmindful of his safety, then he failed to use such intelligence and prudence as in his few years he had acquired, and he cannot recover. In other words, in order to recover, while the law does not hold him up to the obligation of proving that he exercised the degree of care that an adult would exercise, it does hold him up to prove that he exercised such care as his own age, experience and intelligence committed him to. If he did not actually use such intelligence and experience and alertness as he had already acquired, and was unmindful of his safety, he may not recover."

The jury found for the plaintiff in the sum of $500, and the judge reported the case to this court with the statement: "If my rulings were right, judgment is to be entered on the verdict; otherwise, judgment is to be entered for the defendant."

The case was submitted on briefs.

S. Adams, for the defendant.

T. A. McDonnell & F. I. Gallagher, for the plaintiff.

RUGG, C. J. This is an action of tort to recover compensation for personal injuries sustained at about three o'clock in the afternoon of May 10, 1917, by the plaintiff then three years and nine months old, on a public highway in Springfield by reason of collision with an automobile owned and driven by the defendant.

The judge ruled that there was no evidence that the child was in the care of any person at the time and that he was on the highway unattended by any person. The father of the plaintiff testified that when he left home at noon on the day of the accident the plaintiff was there, "that he did not know when the boy left home nor when his wife left home if she did leave; that the boy had gone away at previous times, 'where we didn't know;' that he had gone away alone; that he would not say he wandered away because he wandered back; that he knew where he was going and knew the way back; that he went and came alone without saying anything to anybody; that at several times before the accident the plaintiff had been tied up to make him stay at home, but that this was not a common occurrence." At the close of the plaintiff's evidence his counsel stated that he "was going to stand on the plaintiff's own due care." The case must be considered on the footing that there was no one in charge of him at the time of the accident.

The father of the plaintiff testified also that the boy had been to the house of relatives in West Springfield and knew the way to it himself as well as the way over Plainfield Street and back and had been there before alone, that the boy had been on the street with him very much; that he knew what automobiles were and was afraid of them, "that he always watched for them when they went to cross the street together, 'He would always hold me back before I stepped off the curb to look up and down.'" Another witness testified that the plaintiff was a fairly well developed boy and rather bright and intelligent. The father of the plaintiff further testified that he lived on Plainfield Street, where were two trolley tracks over which ran seven different lines of cars, five on fifteen minute time and two on twenty minute time; that it is sixty feet in width and "is the main avenue between Springfield on the east and West Springfield, Holyoke and Westfield on the

west; that possibly a hundred automobiles passed over it in an hour; that many automobiles passed over it all the while; that in addition trucks and drays and horse drawn vehicles were passing over it all the while." The family consisted of the father, the mother, another younger child, and the mother's mother, who assisted in the duties of the household.

It seems plain under these circumstances that the parents of the plaintiff were negligent in permitting him to be away from home unattended and with his whereabouts unknown for two or three hours. The boy, although bright and careful in his habit about crossing a street, was quite too young and immature to be trusted alone to look out for himself for that length of time in the many emergencies which inevitably confront a pedestrian upon a street like that where he lived. It must be presumed that the child did not possess sufficient discretion to exercise due care and that the parents were negligent in omitting oversight over him for so long a time under the conditions here disclosed. Although many cases have arisen involving the care required of children on the public ways, it never has been suggested that a child only three years and nine months old could be possessed of sufficient judgment to be alone upon such a street as that here shown for a period of two or three hours. The *prima facie* evidence of negligence of parents which has been said in many cases to arise from the presence of a young child upon a busy street is not met at all by explanatory evidence in the case at bar. *Casey* v. *Smith*, 152 Mass. 294. *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145. *Slattery* v. *O'Connell*, 153 Mass. 94. *Gibbons* v. *Williams*, 135 Mass. 333. *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283. *Grant* v. *Fitchburg*, 160 Mass. 16. Nothing in the condition of the family created any exigency justifying such conduct on their part. See *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191, 193. The plaintiff with respect to the care exercised by his parents is not aided by St. 1914, c. 553. *Bullard* v. *Boston Elevated Railway*, 226 Mass. 262.

This, however, is not conclusive against the rights of the plaintiff. The child may still exercise the care required of ordinarily prudent adult persons under the circumstances, and if he does, he is not precluded from recovery It was said in *Wiswell* v. *Doyle*, 160 Mass 42, at page 43, "When a child is too young to

have any intelligence or discretion in regard to taking care of itself in a public street, and when it has carelessly been allowed to go there unattended, still while upon the street it may have done nothing which would be deemed dangerous or lacking in due care, provided its movements had been directed by an adult person of reasonable and ordinary prudence in charge of it, and yet it may have been hurt through the carelessness of another person. Under such circumstances, it may recover damages for the injury." *Collins* v. *South Boston Railroad*, 142 Mass. 301. *Miller* v. *Flash Chemical Co.* 230 Mass. 419.

The accident occurred near the easterly end of the bridge, whereby Plainfield Street, at this point running a little north of west, is carried over north and south tracks of the Boston and Maine Railroad. The bridge is a concrete structure having a length of one hundred feet and a width of sixty-six feet. It is said in the record that "On either side of it are sidewalks for pedestrians about seven feet wide, on the outside of each of which are concrete fences three feet ten inches high. On the inside of each sidewalk and between that and the portion of the bridge reserved for vehicular traffic are concrete abutments twenty-one inches wide and six feet ten and one half inches high at their ends and rising by an arch to seven feet five and one half inches in height in the centre. A similar abutment divides the portions of the bridge which are reserved for vehicular traffic. The portions of the bridge reserved for vehicular traffic are two in number, one on either side of the centre abutment, and are each twenty-three feet nine inches wide. The bridge carries two trolley tracks each near the centre abutment. . . . Fulton Street, which runs north and south on the easterly side of the Boston and Maine Railroad tracks, joins Plainfield Street from the south about fifteen feet easterly of the easterly end of the bridge. Birnie Avenue, which runs north from Plainfield Street, joins that street about fifteen feet easterly of the northeasterly corner of the bridge. The distance from the southeasterly corner of the bridge to the easterly curbing of Fulton Street is about one hundred feet. Plainfield Street descends abruptly from the bridge on its westerly side, and an automobile approaching the bridge from that side is not discernible to a pedestrian on the easterly end of the bridge until it is nearly upon the bridge itself."

The evidence must be considered in its aspect most favorable

to the plaintiff. So far as concerns the occurrence of the accident, it came wholly from one Sauter, the driver of a coal wagon, who was called by the plaintiff and who appears to have been the only eyewitness called except the defendant and his wife. The testimony of the two latter is disregarded because if believed it showed the plaintiff to have been negligent. Sauter was on his wagon driving westerly on Plainfield Street toward the bridge from fifty to one hundred feet easterly of the place where the boy was struck, and was in plain sight of the accident and its immediate surroundings. He testified that he noticed no other vehicles on the street; that the bridge is approached from the east by an up grade, but not by a steep grade; "that he saw the defendant's automobile coming toward him on the right hand side of the bridge coming to Springfield; that while it was on the bridge and until it reached the corner of Fulton Street its speed was about twenty miles an hour; that he first saw the plaintiff standing on the walk near the fence on the end of the bridge; that while the automobile was still on the bridge the boy started to run across the street; that when the boy got into the street the automobile was still on the bridge; that the plaintiff was struck and knocked down by the front part of the automobile when he was in the street and about halfway between the sidewalk and the car track; . . . that at the time of the accident he [the witness] was seventy-five or one hundred feet easterly of the bridge; that he saw the boy, who was alone on the southerly sidewalk; that he saw the boy run right out into the street; that he wouldn't say that he ran out; that he jogged right across; that he did run right into the street; that he ran right across; that the concrete abutment between the part of the bridge used for east bound vehicles and the east bound sidewalk might be from a foot to two feet wide and six or seven feet tall; that the boy was standing near the fence at the end of the bridge railing southerly of the concrete abutment; that the boy simply ran out into the street and was struck; that the abutment hides the view of the sidewalk from a person coming east with a vehicle; that a person coming east on the bridge with a vehicle could not see a person on the sidewalk; that the accident occurred about ten or twenty feet from the easterly end of the bridge."

It is plain under these circumstances that the plaintiff did not exercise the due care of an adult. In order to recover he must

exercise that degree of care under the cases already cited. All the circumstances are revealed. The witness Sauter called by the plaintiff was nearby and was looking from a direction not far from that of the plaintiff and where the whole situation was within his field of vision. The plaintiff went into the path of an obvious danger, voluntarily and not under any constraint for instant action. *Hayes* v. *Norcross*, 162 Mass. 546. *Swetzoff* v. *O'Brien*, 226 Mass. 438. *Kyle* v. *Boston Elevated Railway*, 215 Mass. 260. *Bradley* v. *Bay State Street Railway*, 231 Mass. 572. *Mills* v. *Powers*, 216 Mass. 36. The case is unlike *Dowd* v. *Tighe*, 209 Mass. 464, where the plaintiff was in charge of an elder sister, who might have been found to have been careful.

The case is not saved for the plaintiff by St. 1914, c. 553. The facts here are fully disclosed. Nothing is left to presumption. In the view most favorable to the plaintiff they show that the only rational inference is that the due care of an adult was not exercised by him. The indisputable facts are susceptible of no explanation consistent with such prudence. The accident would not have happened if common caution had been exercised. *Duggan* v. *Bay State Street Railway*, 230 Mass. 370, and cases collected at page 379. *Pigeon* v. *Massachusetts Northeastern Street Railway*, 230 Mass. 392, 396. The case is distinguishable on this point from *Mercier* v. *Union Street Railway*, 230 Mass. 397; *S. C.* 234 Mass. 85. For one, hidden from the view of other travellers by a bridge abutment, to run or "jog" into a city street only a few feet in front of an approaching automobile under the circumstances here disclosed, is an act which the common judgment of mankind must pronounce careless. *Godfrey* v. *Boston Elevated Railway*, 215 Mass. 432. *Kelley* v. *Boston & Northern Street Railway*, 223 Mass. 449.

In accordance with the terms of the report, the entry must be

Judgment for the defendant.

EASTMAN MARBLE COMPANY & others *vs.* VERMONT MARBLE COMPANY.

Suffolk. December 8, 9, 1919. — June 22, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, Specific performance, *Res judicata*. *Equity Pleading and Practice*, Plea, Demurrer. *Contract*, Construction, Validity, Performance and breach. *Res Judicata*. *Perpetuities, Rule against*. *Restraint on Alienation*. *Damages*, For breach of contract. *Landlord and Tenant*, Option for purchase or renewal contained in lease. *Words*, "Controversies," "Prosecutions."

The bar of a suit by a judgment of a court of competent jurisdiction in another suit for the same cause of action between the same parties or those in privity with them extends not only to those matters which were pleaded or litigated in the earlier suit but also to those which might have been pleaded or litigated; but, if the later suit is upon a different cause of action, the bar raised by the judgment in the earlier suit is limited to those matters which actually were litigated and determined.

A New York corporation made with two individuals in 1892 a contract in writing purporting to settle controversies between the parties as to certain quarries and land in Vermont and to adjust and fix boundaries. The individuals afterwards assigned their interest in the contract to a third party, against whom in 1912 the corporation brought a suit in equity in a chancery court of Vermont to restrain him from trespassing and from quarrying upon certain property which the corporation claimed as its own and for an accounting. The property in controversy in that suit was set off to the defendant's predecessors in the contract of 1892, but nowhere in the pleadings in that suit was any mention made or issue raised as to that contract. After a final decree for the plaintiff, the defendant by a supplemental bill in the nature of a bill of review sought to reverse the decree by setting up for the first time the contract of 1892, which he alleged was newly discovered evidence, but afterwards he voluntarily testified that the contract was not newly discovered evidence and the chancellor so found and, upon motion by his attorney, the supplemental bill of review was dismissed and a final decree was entered for the corporation. Subsequently the defendant in the Vermont suit assigned his interest in the contract of 1892 to a corporation which, joining that defendant and his predecessors in title as plaintiffs, brought a suit in equity in Massachusetts against a corporation which was a successor in title to the corporate plaintiff in the Vermont suit, seeking specific performance of the contract of 1892 or damages. *Held*, that

(1) While the parties in the Massachusetts suit were not the same as those in the Vermont suit, they were their privies so far as concerned the contract of 1892;

(2) The causes of action upon which the two suits rested were different;

(3) The judgment in the Vermont suit was conclusive only upon issues therein actually tried and determined.

In the action in Vermont above described, the predecessor of the defendant in the Massachusetts suit sought to enjoin the predecessor of the corporate plaintiff in the Massachusetts suit from continuing trespass upon certain land. Findings by the Vermont chancellor, who heard the case, were directly contrary to recitals in the contract of 1892 relating to knowledge by the plaintiff in that suit of an option of purchase of an interest in the land in dispute given to the defendant's predecessor in title, purchase by the plaintiff of an interest in that land in defiance of that option, and removal by the defendant's agents of bounds marking the line between the property of the parties. The chancellor also found that the plaintiff in that suit was "a purchaser in good faith for value of the land which it claims to own . . . without notice of right or a claim of defendants," who were plaintiffs in the Massachusetts suit, "or any of their predecessors to any part thereof." Further findings of the chancellor, and the decree based thereon, defined the boundaries between the land of the parties and were of such a character as to make impossible of performance a part, but not all, of the undertakings of the plaintiff in that suit as set out in the contract of 1892. The findings were made before the defendant, by the supplemental bill in the nature of a bill of review had, for the first time, brought the contract of 1892 into the case. There was no issue raised by the pleadings upon which a finding as to the good faith of the plaintiff in that suit in its acquisition of title was made necessary. In the Massachusetts suit, the defendant set up the proceedings and the decree in the Vermont suit in a plea in bar, which contained no recital as to the law of Vermont. *Held*, that

(1) The findings of the chancellor in the Vermont suit as to good faith on the part of the plaintiff there (predecessor of the defendant in the Massachusetts suit) not being pertinent to any issue raised by the pleadings, were not *res judicata* as to any issue raised in the Massachusetts suit;

(2) The differences in locations of boundaries, as described in the alleged contract of 1892 and in the findings by the chancellor in the Vermont suit and the decree based thereon, were not such as of themselves on their face to justify a ruling on the plea as a matter of law that the contract was unenforceable;

(3) While the alleged contract of 1892, if it had been presented in the Vermont suit and there found genuine, would have been decisive in favor of the contentions of the defendant there (the predecessor of the plaintiff in the Massachusetts suit) his failure to offer it in evidence at that trial, when it was not in issue on the pleadings, did not as a matter of law prevent his assignee from relying on it in the Massachusetts suit in so far as its obligations were not at variance nor inconsistent with adjudications in the Vermont suit upon issues there actually raised and determined;

(4) The plea must be adjudged bad as a matter of law.

Whether, under modern equity pleading and practice, the earlier rule prevails that the filing of a general plea is a waiver of a general demurrer, was not determined in a suit where a plea was filed "by consent" and "without waiving . . . demurrer," and where the trial judge, stating that he was of opinion that an interlocutory decree should be entered adjudging the plea insufficient and overruling the demurrer, reported the case to this court for determination.

A contract susceptible of two meanings, one lawful and the other not, will be supported rather than defeated, the presumption being, in the absence of something

to show the contrary, that the parties intended to act in accordance with the law.

Recitals in a contract, that it was made with a view to stopping certain "controversies" between the parties as to certain land and certain "prosecutions" which had been "threatened" because of illegal attempts to remove bounds, and a certain conspiracy to deprive one of the parties to the contract of a right to exercise an option to purchase certain land, do not as a matter of law render the contract illegal, because they do not necessarily mean that the parties by their contract sought to stifle criminal prosecutions.

A contract in writing and under seal, entered into between owners of adjoining land, both parties binding their heirs, executors, administrators and assigns, and containing recitals that it was made because of controversies as to boundary lines, a threatened prosecution of one party for attempted removal of fixed bounds, and a conspiracy by the same party to procure an interest in adjoining land in defiance of an option of purchase held by the other party, besides providing for the establishment of boundary lines and the execution of correcting deeds, provided that one of the parties would convey to the other party or his assigns at his or their option at any time within twenty-five years a nine tenths interest in a certain described parcel of real estate for a stipulated price and would "not enter into any deal" for the acquisition of a certain other adjoining lot or of an outstanding fractional interest in the lot first mentioned, but that if, owing to previous arrangements, he or they should acquire such lot or interest, it should be held for a like period of twenty-five years and conveyed upon demand to the second party and his associates and assigns upon payment of the amount paid therefor with interest and taxes. *Held*, that

(1) The contract was not a mere option to purchase;

(2) The contract created an equitable interest in land;

(3) The contract was void as being in violation of the rule against perpetuities and the rule against restraints on alienation.

If a suit in equity cannot be maintained to enforce specific performance of a contract creating an equitable interest in land because the contract is in violation of the rule against perpetuities and of the rule against restraints on alienation, neither can such a suit be retained for an assessment of damages resulting from a breach of the contract.

The questions presented and determined in the suit above described have nothing to do with options for purchase or renewal contained in leases.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on July 18, 1917, and afterwards amended by the filing of a substitute bill on June 10, 1919, by the Eastman Marble Company, a Massachusetts corporation, Harvey T. Buck, Louella Howe Grant, both individually and as administratrix of the estate of John W. Howe, and George P. Eastman against the Vermont Marble Company, a Vermont corporation, seeking specific performance of a contract in writing dated July 18, 1892, relating to certain land containing quarries in West Rutland in Vermont, the parties to the contract being a New York corporation

which was the predecessor of and bore the same name as the defendant, and two of its official agents, parties of the first part, and the plaintiffs John W. Howe and Harry T. Buck, parties of the second part, they having assigned their individual interest therein to the plaintiff Eastman by an instrument dated February 18, 1904, and their successors also having made such assignments by instruments dated May 7, 1917, Eastman in turn assigning such interest to the plaintiff corporation on July 16, 1917. The substance of the contract is described in the opinion.

The defendant filed a demurrer to the whole substituted bill "by consent" on June 13, 1919, alleging the following causes of demurrer:

"1. The alleged contract [of July 18, 1892] . . . does not purport to be authorized by the board of directors of the defendant and is not duly executed nor properly attested as the contract of the defendant, and does not bear any seal purporting to be the corporate seal of the defendant.

"2. Said alleged contract appears upon its face to be unenforceable against the defendant either by specific performance or by action for damages for the following reasons:

"(a) Said alleged contract recites that it is in compromise of certain prosecutions threatened by the parties of the second part, to whose rights the plaintiff claims to have succeeded, against the defendant and others, parties of the first part, by reason of alleged removal of landmarks and monuments marking the boundary line between their respective lands, and in settlement of a claim by the parties of the second part that the defendant and others had been guilty of a conspiracy to acquire the disputed territory from the parties of the second part.

"It is therefore illegal and no action lies upon it.

"(b) Said alleged contract appears upon its face to have been procured by duress of threatened prosecutions for the crime of removing monuments designating the boundaries of the disputed land against this defendant and other parties desirous of avoiding the threatened proceedings.

"It is therefore unenforceable and no action lies upon it.

"(c) Said alleged contract being an agreement by the parties of the first part to convey lands at any time within twenty-five (25) years from July 18, 1892, at the option of the parties of the second

part, is in violation of the rule against perpetuities, is against public policy, unenforceable, and void.

"(d) Said alleged contract being an agreement by the parties of the first part to convey lands at any time within twenty-five (25) years from July 18, 1892, at the option of the parties of the second part, is an illegal restraint upon alienation, is against public policy, and void.

"(e) Said alleged contract being an agreement by the parties of the first part that neither they nor the said Fant shall dispose of or in any way injure or encumber said premises before the expiration of said period of twenty-five years is an illegal restraint upon alienation, is against public policy, and void.

"(f) Said alleged contract being an agreement by the parties of the first part that they will not enter into any deal directly or indirectly for the acquisition of any interest in certain lands for the period of twenty-five years, and by the parties of the second part that they will not acquire certain other lands for said period, is against public policy and void.

"Wherefore, in respect of all the relief sought by the plaintiff thereunder, the said contract is wholly unenforceable and void."

On the same day that the defendant filed its demurrer by consent, it also filed "by consent" a "Plea in bar to the whole of the substituted bill of complaint," which recited that it was filed "Without waiving its demurrer." The grounds of the plea were that the subject matter of the substituted bill was *res judicata* by reason of the proceedings and final decree in a suit in the chancery court of Rutland County in the State of Vermont, described in the opinion.

The plea and the demurrer were heard by *Braley*, J. Material allegations in the pleadings are described in the opinion. The single justice was of opinion that an interlocutory decree should be entered overruling the demurrer and adjudging the plea to be insufficient; but at the request of the defendant he reported the case to the full court for its determination.

The case was argued at the bar in December, 1919, before *Rugg*, C. J., *De Courcy*, *Pierce*, & *Jenney*, JJ., and afterwards was submitted on briefs to all the Justices except *Braley*, J.

B. B. Jones, for the plaintiffs.

F. H. Nash, for the defendant.

RUGG, C. J. This is a suit in equity whereby the plaintiffs seek to obtain the specific performance of a written contract to convey land containing marble quarries and located in West Rutland in the State of Vermont. The contract bearing date July 18, 1892, purports to have been signed by the Vermont Marble Company, a New York corporation, predecessor of the defendant, a Vermont corporation, which, together with two of its officers or agents constitute the party of the first part, and by John W. Howe and Harvey T. Buck, to whose rights the corporate plaintiff alleges that it has succeeded by assignment from Howe and Buck to the plaintiff George P. Eastman and from Eastman to the plaintiff the Eastman Marble Company. The contract purports also to be signed by other parties not here concerned. Since the two others joined with the Vermont Marble Company as parties of the first part to the contract both were its officers or agents, for convenience reference hereafter will be made to that corporation alone as the party of the first part. For convenience also reference will be made to Howe as including both himself and his associate.

The contract recites (1) that the Vermont Marble Company claims ownership to nine tenths interest in the Clark lot, so called, adjacent to a lot known as the American lot, by conveyance from one Fant; (2) that Howe, by assignment of an agreement dated May 8, 1890, held an option to purchase said nine tenths interest; (3) that the Vermont Marble Company, well knowing of that outstanding contract and option, nevertheless in defiance thereof and without the knowledge of Howe, obtained from the owner of said nine tenths of the Clark lot a conveyance thereof by deed of May 27, 1890; (4) that controversies had arisen between the parties as to the divisional line between the American lot and the Clark lot and prosecutions had been threatened by reason of removal by one Robinson, an agent of the Vermont Marble Company, of monuments marking the boundary between the two lots; and (5) that Howe believed the Vermont Marble Company and others, including Robinson, its agent, were conspiring to purchase the Manley lot so called lying next northerly of the Clark lot, well knowing that the owners had given to Howe on March 3, 1892, an option to purchase it and the remaining one tenth interest in the Clark lot.

The agreements of the contract are in part (1) that the monuments removed shall forthwith be restored to their original posi-

tions; (2) that the divisional line between the American and Clark lots shall "be and remain as it originally existed prior to the above mentioned removal or removals" of the bounds "and as it was originally laid out on the land," namely, a line parallel with and about sixteen and one half rods south of the Blanchard and Mead line, with references to two plans, one known as the Brown plan, dated in September, 1866, and the other as the Green plan, dated in July, 1873; (3) that the parties will join in making deeds for the reformation of the record descriptions contained in former deeds, to conform to the divisional line thus agreed upon; (4) that the Vermont Marble Company will at any time within twenty-five years at the option of Howe and his associate and their assigns convey to them nine tenths interest in the Clark lot for $2,800 with interest and taxes; (5) that the Vermont Marble Company will "not enter into any deal" for the acquisition of any interest in the Manley lot or in the remaining one tenth of the Clark lot, but that, if owing to previous arrangements it should acquire interests, then it will hold them for a like period of twenty-five years and convey them upon demand to Howe and his associate and assigns upon payment of the amount paid therefor with interest and taxes.

The bill alleges the acquisition of the remaining one tenth interest in the Clark lot and of the entire Manley lot by the Vermont Marble Company contrary to the terms of the contract, tender by the plaintiff of the amount due to the Vermont Marble Company in accordance with the terms of the contract, and demand for conveyance, refusal by the Vermont Marble Company to make such conveyance and denial by it of the validity of the contract, and concludes with appropriate prayers for specific performance of the contract or in the alternative for the assessment of damages for breach of the contract.

The defendant demurred to the bill and also filed a plea. The case comes before us on a report. The sufficiency of the plea is considered first.

The plea sets out in substance and effect these facts: In 1912 the defendant, the Vermont Marble Company, instituted in the Court of Chancery for Rutland County in the State of Vermont a suit seeking to restrain George P. Eastman, one of the present plaintiffs and the assignor of the corporate plaintiff in the suit at bar,

and one Clement, whose title was for the benefit of Eastman, from quarrying marble on the Fant lot (which is another name for the Clark lot), and for accounting and other relief. Eastman and Clement filed an answer to that suit and also a cross bill whereby they asserted ownership in themselves to the parcel of land twenty rods in width lying south of the divisional line established by the alleged contract of July 18, 1892, as the line between the American lot and the Clark lot. Answer was filed to the cross bill and the case went to trial.

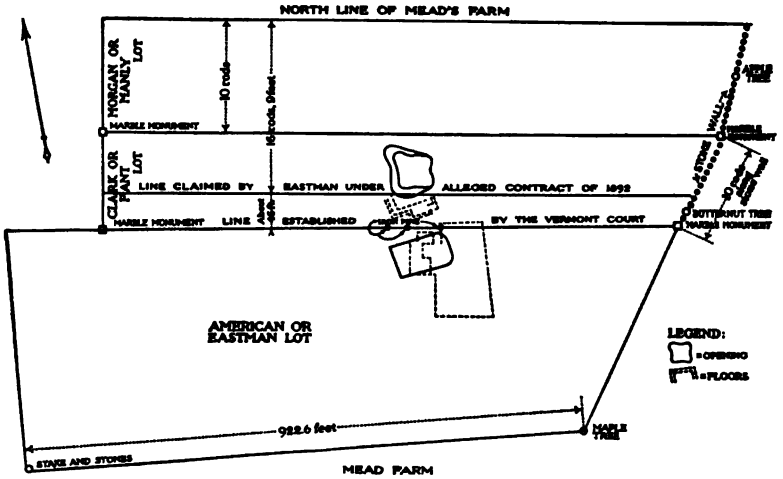
The fundamental issue involved in those proceedings was the precise location of the Fant or Clark lot. That location depended chiefly upon the true boundary line between the American lot, so called, owned by Eastman and Clement, and the Clark or Fant lot owned by the Vermont Marble Company. The question whether Eastman had trespassed upon land of the Vermont Marble Company and had taken marble therefrom depended upon the ascertainment of the location of that boundary line. The determination of that question necessarily involved an inquiry into the chains of title by which the several parties to that suit acquired their holdings to the land and inevitably required a delimitation of the boundaries of the several parcels of land conveyed to each. That suit and cross bill were heard by the chancellor, who filed comprehensive and clear findings of fact. These findings of fact are unmistakably plain to the effect that the true boundary line between the American lot owned by Eastman and the Clark or Fant lot owned by the Vermont Marble Company is about three rods southerly of that boundary line as described in the contract of July 18, 1892, here in suit. The findings of fact of the chancellor show that in 1866 Andrew J. Mead owned all the property in controversy. The plan, a reduced copy of which is printed on page 146 herewith, shows distinctly the several lots as claimed and as found. After a full review of the history of the several titles and the deeds by which they were conveyed, the chancellor reached these conclusions:

(a) The north line of the Mead farm, which was also the boundary between it and land of Benjamin F. Blanchard, is not open to controversy. The litigation proceeds upon the footing that that is fixed.

(b) The Manley or Morgan lot, which was conveyed to the

Vermont Marble Company (two thirds in 1905 by deed of John H. Mead and another, and one third by deed of Eastman in 1911 pursuant to the order contained in the decree of a court of chancery), is ten rods in width and its southerly line is distant southerly from the north line of the Mead farm ten rods and is parallel therewith.

(c) The Fant or Clark lot (the title to all of which has vested in the Vermont Marble Company and one third of one tenth of which was conveyed to it by Eastman in accordance with an order contained in the decree of a court of chancery in 1911), is ten



rods in width southerly of and adjacent to the Manley or Morgan lot and its southerly line is distant southerly from the north boundary of the Mead farm twenty rods and is parallel therewith.

(d) This southerly line of the Clark or Fant lot is also called by the chancellor the present "pin line," because it is marked in part by three iron pins in a line between two marble posts, one post being set substantially at each end of that boundary line. The two marble posts and the three iron pins marking this boundary line all were put in place before 1890.

(e) The Vermont Marble Company "is a purchaser in good faith for value of the land which it claims to own in this suit without notice of right or a claim of defendants or any of their predecessors to any part thereof (except such as may appear in the deeds which are herein received in evidence and such evidences on the

ground as have been indicated). Neither of the defendants, Eastman and Clement, has ever had a deed of any land north of a line parallel with and twenty rods south of Mead's north line, other than the deeds herein mentioned and made a part of these findings of fact." These deeds manifestly refer to those by which Eastman acquired certain interests in that land, interests subsequently conveyed to the Vermont Marble Company.

(f) Neither Eastman nor Clement nor their predecessors in title "ever occupied or possessed land north of a line parallel with and twenty rods south of Mead's north line," prior to the deed from Howe to Eastman of May, 1903.

(g) Further findings of the chancellor relate to the Brown plan and the Green plan and the surveys upon which they were based. It is not necessary to narrate them in detail.

The chancellor made an order for a final decree establishing the boundary line between the American lot owned by Eastman and the Clark or Fant lot owned by the Vermont Marble Company as the line marked by the two marble monuments at the east and west ends and running through the three iron pins, forever restraining Eastman, his servants and agents, from trespassing upon land of the Vermont Marble Company to the north of that line and directing the payment of substantial damages. The case then went to the Supreme Court of the State of Vermont and is reported in *Vermont Marble Co.* v. *Eastman*, 91 Vt. 425. In an exhaustive opinion by Mr. Justice Watson the decree of the chancellor was affirmed.

After the mandate from the Supreme Court, which was filed May 4, 1917, Eastman and Clement filed in the chancery court on May 16, 1917, a supplemental bill in the nature of a bill of review, which sought a rehearing on the ground of newly discovered evidence. That newly discovered evidence was the contract of July 18, 1892, upon which the plaintiffs rely as the foundation of the suit at bar. Protracted hearings were had upon that bill of review on the issue whether the alleged contract of July 18, 1892, was genuine. After being once concluded, the hearings were reopened on motion of the Vermont Marble Company to permit it to introduce further evidence bearing on the genuineness of that contract. Eastman thereupon was permitted to testify that whereas he had previously testified that his first knowledge of said

alleged contract of July 18, 1892, was obtained on May 6, 1917, such was not the fact, and that in truth he knew of its existence before that date. It was thereupon found by the chancellor as a fact that said alleged contract of July 18, 1892, was not newly discovered evidence and upon motion of attorneys for Eastman and Clement, the supplemental bill was dismissed and a final decree entered in accordance with the mandate of the Supreme Court.

"The proper office of a plea is . . . to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large." Mr. Justice Gray in *Farley* v. *Kittson*, 120 U. S. 303, 314. *Newton* v. *Thayer*, 17 Pick. 129, 132. The question is whether the fact of the Vermont adjudication, in connection with all the circumstances disclosed on the record, is a bar to the maintenance of the present suit.

The main force of the plea in the case at bar is that the findings and judgment in the Vermont suit constitute a bar to the maintenance of the present suit. It rests in essence upon the doctrine of *res judicata*. The bar of a judgment in another suit for the same cause of action between the same parties, or those in privity with them, extends not only to that which was pleaded or litigated in the earlier suit, but also to that which might have been pleaded or litigated. *Newburyport Institution for Savings* v. *Puffer*, 201 Mass. 41, 46. But if the second suit is upon a different cause of action, the bar of the earlier judgment is limited to that which was actually litigated and determined. *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 257. The parties to the present suit manifestly are not the same as those to the Vermont litigation. The present plaintiff has been incorporated since the termination of the Vermont suit. While the parties to the present suit are not the same as those to the Vermont litigation, they are privies so far as concerns the alleged contract. The present plaintiff holds all its rights under the alleged contract of July 18, 1892, by assignment from Eastman, who was a party to the Vermont suit. It is obviously and necessarily a privy with Eastman as to all matters arising out of and dependent upon that contract. *Hart Steel Co.* v. *Railroad Supply Co.* 244 U. S. 294, 298.

The cause of action set out in the bill of complaint in the Vermont

suit was the continuing trespass by Eastman upon land of the Vermont Marble Company. The issues raised by the pleadings in that suit were the title of that company to the Clark or Fant lot and the trespasses of Eastman thereon. The chief controversy there litigated centred about the precise location of the line between the American lot and the Clark or Fant lot. The alleged contract of July 18, 1892, was not referred to in the pleadings upon which the trial was had, wherein the findings of the chancellor were made as to the true location of the Clark lot. The first reference to that contract is in the supplemental bill in the nature of a bill of review. The only adjudication with reference to it is that it was not newly discovered evidence with reference to the trial of that suit. The alleged contract of July 18, 1892, constitutes the basis of the suit at bar. Specific performance of that contract is the relief sought by the plaintiff. Thus it appears that the causes of action upon which the two suits rest are not the same, but different. The rule of *res judicata* applicable under these circumstances is that "when the second action between the same parties is upon a different cause of action from the first, then the judgment in the former action is conclusive only upon those issues which were actually tried and determined." *Foye* v. *Patch*, 132 Mass. 105, 110, 111. "If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 353." *Bates* v. *Bodie*, 245 U. S. 520, 526. *Eastman* v. *Cooper*, 15 Pick. 276. *Arnold* v. *Arnold*, 17 Pick. 4. *Radford* v. *Myers*, 231 U. S. 725.

The plea in the case at bar, incorporating as it does the proceedings of the Vermont court, contradicts the recitals in the contract of July 18, 1892, in at least three particulars: (1) knowledge by the Vermont Marble Company of the existence of the option held by Howe for the purchase of the Clark lot, (2) purchase of an interest in that lot by the Vermont Marble Company in defiance of that option, (3) the removal of bounds marking the true line between the American lot and Clark lot. The findings of the chancellor render impossible of execution the first three agreements of said contract, all of which relate to the true boundary line between the American lot and the Clark lot. That was a

matter directly adjudged in the Vermont suit and it binds the parties to the suit at bar notwithstanding the contract. The defendant strongly relies in this connection upon the finding of the chancellor to the effect that the Vermont Marble Company was "a purchaser in good faith for value of the land which it claims to own in this suit without notice of right or a claim of defendants" in that suit, who are joined as plaintiffs here, or "any of their predecessors to any part thereof," with exceptions not here material, a finding with reference to the Fant lot or the Clark lot. The size and precise boundary lines of that lot were established by the chancellor. The Clark lot as thus established is different in location and size from that described in the alleged contract. Upon familiar principles that finding and opinion are to be interpreted in the light of the issue as framed by the pleadings. *Reinman* v. *Little Rock*, 237 U. S. 171, 179. The issue framed by the pleadings in the Vermont case related wholly to legal title to real estate. No question was raised by the pleadings upon which a finding as to good faith of the Vermont Marble Company in its acquisition of title was necessary. On the question of title as disclosed by the record of the Vermont case, the point whether the Vermont Marble Company was "a purchaser in good faith for value of the land" which it claimed to own was of no consequence. Such a finding may have been pertinent to some contentions mooted at the trial and hence included within the decision of the chancellor. However that may be, there is no averment in the plea concerning the law of Vermont. Hence it must be assumed to be the same as that of Massachusetts. *Parrot* v. *Mexico Central Railway*, 207 Mass. 184, 191–194. Under the law of Massachusetts upon the issues raised by the pleadings in the Vermont case, the finding to the effect that the Vermont Marble Company was "a purchaser in good faith for value of the land which it" claimed in the Vermont suit to own would not be *res judicata* against the plaintiff as to the contract of July 18, 1892, here in suit. That contract was not in the issue at that time, and that finding of the chancellor, whatever its force in that suit, cannot be thought to have been made with reference to any such issue as is raised in the present cause.

The differences in location and size of the Clark and Manley lots as described in the alleged contract of July 18, 1892, and as set

forth in the finding of the chancellor in the Vermont case, are not such as of themselves on their face to render unenforceable the contract. Whether there is such a difference as to affect the identity of the subject matter of the contract must be determined upon a trial. See *Dzuris* v. *Pierce*, 216 Mass. 132, 135, and *Percival* v. *Chase*, 182 Mass. 371.

The alleged contract, if presented as evidence in the Vermont trial and found genuine, would have been decisive in favor of the contentions of Eastman. His failure to offer it in evidence at that trial where it was not in issue on the pleadings does not as matter of law prevent him from relying upon it as an independent cause of action. Of course the plaintiff as the assignee of Eastman can enforce its obligations only so far as it is not at variance nor inconsistent with the matters in issue and adjudged in the Vermont suit. But subject to the adjudications of that suit as to the matters in issue on the pleadings in that suit, the plaintiff is not barred from prosecuting whatever rights it may be able to prove arising out of the alleged contract of July 18, 1892. The plea is therefore bad.

Without pausing to discuss the point whether under modern equity pleading and practice the earlier rule prevails that the filing of a general plea is a waiver of a general demurrer, we consider the questions raised by the demurrer, since these have been reported by the single justice.

It is urged that the alleged contract is illegal or void on its face because it undertakes to strangle threatened criminal prosecutions. This contention cannot be supported. It is recited in the alleged contract that "controversies" have arisen as to the location of the divisional line between the American lot and the Clark lot and "certain prosecutions have been threatened" on account of recent attempts to remove bounds. These controversies, for aught that appears, may all have been honest, the removal of bounds open, notorious and under claim of right, and the prosecutions civil actions designed to test the titles of the respective parties. While "prosecution" often is used to describe a criminal proceeding, that is not its necessary signification. It frequently is used respecting the carrying forward of litigation on the civil side of the court. *Clinton* v. *Heagney*, 175 Mass. 134. It is fundamental that an agreement resting in any part upon an illegal consideration is of

no binding force. *Taylor* v. *Jaques*, 106 Mass. 291. A contract susceptible of two meanings, one lawful and the other not, will be supported rather than defeated. The presumption is, in the absence of something to show the contrary, that the parties intended to act in accordance with the law. Presumptions are in favor of innocence and legality. *Guernsey* v. *Cook*, 120 Mass. 501. *Collector of Taxes of Boston* v. *Rising Sun Street Lighting Co.* 229 Mass. 494, 497.

The recital in the contract concerning a conspiracy stands upon the same footing. That word does not necessarily import a crime. The alleged criminal aspect of the contract is not made certain by the clause that it shall not be recorded nor made public. That might have been inserted from innocent motives.

It is urged that this contract is void because in violation both of the rule against perpetuities and of the rule against restraints on alienations. That contention is grounded on the express covenant to the effect that conveyance shall be made of the real estate by the Vermont Marble Company upon demand at any time within twenty-five years from the date of the contract and upon the necessary implication that there shall be no other conveyance at all during that period.

These two rules, as pointed out by Mr. Gray in § 2a of Rule against Perpetuities (3d ed.), are "modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote." A common form of the statement of the rule against perpetuities is that executory limitations or interests are void unless they take effect *ex necessitate* and in all possible contingencies within a period not exceeding twenty-one years after the termination of a life or lives in being at the creation of them. *Minot* v. *Paine*, 230 Mass. 514, 522, and cases there collected. See Gray, Rule against Perpetuities, (3d ed.) § 201. It is an essential characteristic of an estate in fee simple that it shall be alienable and free from restraint in that particular.

The contract in the case at bar is not a mere option to purchase. If the contract had been a simple personal agreement of that sort, it would have given to Howe and to the plaintiff "no interest in the property." *Thacher* v. *Weston*, 197 Mass. 143, 147. See cases collected at 39 Cyc. 1238, note 19. The contract here in suit was in the form of covenants under seal binding heirs, executors, ad-

ministrators and assigns of each party. It concerned real estate and purported to create important interests therein quite apart from the clause as to conveyance to Howe. The clause relating to purchase by and conveyances to Howe cannot be excised from the instrument, dissociated from its context and treated as if it were a separate, distinct and independent option unconnected with other clauses. It must stand or fall as a part of a single document with a defined consideration covering all matters of agreement. Such a clause in such a contract, in the light of the other clauses, must be held to create an equitable interest in land.

We think that this agreement, so far as concerns a right to specific performance, was void as being in contravention of one or both of these rules. The agreement purports to create an equitable interest in land. It is not a mere option. It is in the form of mutual covenants. It purports to create an absolute right to be exercised within twenty-five years and imposes an immediate restraint upon alienation by the owner for a like period. It is in that respect unenforceable under the rule. *Winsor* v. *Mills*, 157 Mass. 362. *London & Southwestern Railway* v. *Gomm*, 20 Ch. D. 562, 576, overruling *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421. *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, 540, 541. *Barton* v. *Thaw*, 246 Penn. St. 348. *Woodall* v. *Bruen*, 76 W. Va. 193. *H. J. Lewis Oyster Co.* v. *West*, 93 Conn. 518.

The foundation of the rules against perpetuities and against restraints upon alienation is that it is contrary to the spirit of our institutions that titles to real estate be tied beyond the period fixed so as to stifle free exchange. Therefore deeds to that end are held void.

It is contended that, even if specific performance of the contract must be denied because of these rules, yet damages may be recovered for breach of the contract against the maker.

It is doubtful whether the allegations of the bill go far enough to show that the defendant is liable as the maker of the contract. The maker of the contract was the New York corporation. The defendant is the Vermont corporation of the same name. *Brighton Packing Co.* v. *Butchers Slaughtering & Melting Association*, 211 Mass. 398, 403, 404. *Gray* v. *Hemenway*, 212 Mass. 239, 242. *Marsch* v. *Southern New England Railroad*, 230 Mass. 483, 498. If the defendant was not the maker of the contract, there would be

difficulty in supporting an action against it for breach of such a contract as this. *London & Southwestern Railway* v. *Gomm*, 20 Ch. D. 562. But we pass that point by.

The reason, on which rest the rule against perpetuities and the rule against restraints on alienation, equally inhibits the recovery of damages for breach of a contract not specifically enforceable because in contravention of one or both of these rules. The tendency of mulcting one for breach of a covenant to convey land, in the nature of things in the ordinary case, has as much deterrent force and effect in arresting the free circulation of property as would the specific enforcement of such contracts. If one must pay full damages for refusing to perform such a contract, it would for all practical purposes constrain him from making a conveyance and compel him to refuse to alien the title and hence would tie up the title to property quite as much as liability to injunction against alienation and to a decree for specific performance. One method would be as efficacious as the other against "forwarding the circulation of property which it is" the policy of the common law to foster. *Sage* v. *Hampe*, 235 U. S. 99, was an action to recover damages for breach of contract to purchase certain land and to convey to the plaintiff certain other land. The defendant contended that the land to be conveyed by him belonged to Indians, which under act of Congress could not be conveyed away for twenty-five years. In holding that such an action could not be maintained, it was said at page 105: "A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for nonperformance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. . . . And more broadly it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit." That principle and those words are equally pertinent to the contention that the present plaintiff can recover damages for breach of a covenant which is void. "Contracts . . . against alienation of land, including those violating the law of perpetuities," were included among those held to have been "illegal on principles long recognized by the common law" in *Egerton* v. *Brownlow*,

4 H. L. Cas. 1, at page 125. It was held in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1900] 2 Ch. 352, at page 360, that apart from a validating act of Parliament an agreement between two corporations to the effect that one should have first refusal to buy land belonging to the other used as a race-course should it cease to be so used or be proposed for use for dock purposes, "would be clearly void for perpetuity, because there is no limitation in point of time." *In re Rosher*, 26 Ch. D. 801. *Hope* v. *Mayor & Aldermen of Gloucester*, 7 De G., M. & G. 647. See 51 Sol. J. & W. R. 648, 669; 54 Ibid. 471, 501. There seems to us to be an irreconcilable inconsistency in refusing to enforce specifically covenants concerning an interest in property which violate the rule against perpetuities and yet at the same time enforcing an action for damages for refusal to perform such a covenant. Since it is settled that such covenants cannot be enforced specifically, it must follow that damages cannot be recovered for such refusal. Any other conclusion would afford simple and direct means, at least for corporations which ordinarily have unlimited existence, through the form of options to buy covering long periods and binding heirs and assigns, to circumvent the rule against perpetuities and restraints upon alienation. Since such contracts are held to create "no interest in the property" (*Thacher* v. *Weston*, 197 Mass. 143, 147, and cases collected 39 Cyc. 1238, note 19), there would be no difficulty in enforcing such agreements either by specific performance or by action for their breach no matter how long might be their term. The mischiefs would easily arise against which those rules were established.

The contention that an action for damages lies for breach of a contract which violates the rule against perpetuities is supported by the decision of Warrington, J., in *Worthing Corp.* v. *Heather*, [1906] 2 Ch. 532, and gains some color from what was said in *South Eastern Railway* v. *Associated Portland Cement Manufacturers, Ltd.* [1910] 1 Ch. 12. See also Gray, Rule against Perpetuities, (3d ed.) § 330*c*. So far as these decisions conflict with the conclusion here stated, we are not disposed to follow them.

The result reached in *South Eastern Railway* v. *Associated Portland Cement Manufacturers*, Ltd. [1910] 1 Ch. 12, doubtless was right and would have been reached had the case arisen in this Commonwealth not on the ground there stated by the judges in the

court of appeal, but by construing the deed as creating an immediate easement by exception or by reservation under principles summarized with collection of authorities in *Childs* v. *Boston & Maine Railroad*, 213 Mass. 91. For another ground upon which the Cement Company decision may be thought to stand, see 27 Law Quar. Rev. 154, 155.

There is nothing in the decision in *Winsor* v. *Mills*, 157 Mass. 362, at variance with this conclusion. In that case real estate was held upon a trust which in some of its terms violated both the rule against perpetuities and the rule against restraints on alienation. A bill in equity was brought by the executors of one beneficiary, who was also the trustee, seeking to sell the real estate, the defendant being the other beneficiary. The invalidity of those portions of the trust violative of these two rules of property was declared, but relief to the plaintiffs was made conditional, according to the opinion of a majority of the court, upon the view that it would be inequitable to give relief to the plaintiffs unless they were willing to perform the agreement of their testator with the defendant affording the latter opportunity to purchase upon terms stated in the original agreement. That was a quite different proposition from allowing the maintenance of a direct action for damages for breach of the agreement.

The question presented on this record has nothing to do with options for purchase or renewal contained in leases. See in this connection *Mann, Crossman & Paulin, Ltd.* v. *Registrar of Land Registry*, [1918] 1 Ch. 202, and cases collected in 27 Yale Law J. 885.

The result is that an interlocutory decree should be entered sustaining the demurrer on grounds 2 (c), (d), (e) and adjudging the plea insufficient.

So ordered.

WALTER L. BARRELL & another *vs.* WILLIAM A. PAINE & others.

Suffolk. January 14, 15, 1920. — June 22, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Wagering Contracts. Husband and Wife. Agency, What constitutes. *Practice, Civil*, Auditor's report. *Evidence*, Presumptions and burden of proof.

In an action by a husband and wife jointly against a stockbroker for money paid in transactions alleged to have been of the character described in R. L. c. 99, § 4, it appeared that the wife "never had a clear conception of the nature of these transactions, although in a general way she knew about them and authorized her husband's acts," and that, while she "never had an affirmative intent that there should not be actual purchases and sales . . . she intended to leave the . . . business to her husband." The husband had the affirmative intention, required for recovery under the statute, that there should be no actual purchase or sale of securities in the transactions. *Held*, that these facts were a sufficient basis for a finding that the husband acted as the agent for his wife and that his intention bound the defendant so far as her interests were affected.

Where an action is heard upon an auditor's report, and upon other evidence which does not contradict nor affect the findings of the auditor, the report is *prima facie* evidence and requires a judgment in accordance with its findings of fact unless, upon all the facts found, both primary and subsidiary, the report is reasonably susceptible of more than one inference.

In an action against a stockbroker for money alleged to have been paid in transactions of the character described in R. L. c. 99, § 4, which was heard by a judge without a jury upon an auditor's report and other evidence, findings of the auditor that the plaintiff's orders in the transactions in question were for purchases or sales of less than one hundred shares of a particular stock at a given time, called in the trade transactions in "odd lots," and that, subsequent to each order by the plaintiff for a purchase or sale which the defendant reported to the plaintiff had been executed by him, a certificate for the corresponding number of shares in that stock was delivered by or to the defendant to or from some other stockbroker and a check received for the price of the stock, establish the defence, stated in the statute, that actual purchases and sales were made upon the order of the plaintiff; and such findings are not affected by further findings of the auditor, that the defendant during the period covered by the plaintiff's transactions was at various intervals and in substantial amounts "short" of the stocks which he purported to be carrying for the plaintiff in the sense that on balancing up his books for the day a balance of such stocks sufficient to meet the demands of all customers then on his books was obtained only by including in the account, kept by the defendant to show his resources in such stocks, stocks owed the defendant by other brokers and stocks owed the defendant by other customers for whom the defendant had executed "short" sales.

CONTRACT upon an account annexed containing nineteen items of sums of money and securities alleged to have been paid to and dividends alleged to have been received by the defendants, a firm of stockbrokers, upon transactions within the provisions of R. L. c. 99, § 4. Writ dated April 23, 1917.

The action was referred to an auditor and afterwards was heard by *Raymond*, J., upon the auditor's report and other evidence. Material findings of the auditor and other evidence are described in the opinion. At the close of the evidence the plaintiffs asked, in requests numbered 1, 2 and 5, for rulings that, upon all the evidence as a matter of law, the plaintiffs were entitled to recover upon fifteen of the nineteen items of the account annexed to the declaration. The plaintiffs also asked for the following rulings:

"6. Upon all the evidence in the case as a matter of law the defendants have failed to prove actual purchases and sales of all the stocks ordered bought and sold for the plaintiffs' account.

"7. If the court finds that the plaintiffs gave the defendants orders to purchase stocks for the plaintiffs and subsequently covered these buying orders by corresponding orders to sell the same number and kind of stocks, without having actually received from or delivered to the plaintiffs certificates for any of those stocks, such transactions would be *prima facie* evidence within the meaning of R. L. c. 99, § 6, that the plaintiffs had an intention that there should be no actual purchase or sale and that the defendants had reasonable cause to believe that said intention existed.

"8. If the court finds that the orders for the original purchases of shares of Studebaker, Lackawanna Steel and Baldwin Locomotive were made with the intent on the part of the plaintiffs that they should not receive from the defendants any of the shares represented by said orders, but with an intention to cover those orders later by corresponding orders to sell, and to make such profit or loss as might result therefrom without having actually received or delivered any of the shares, and that the defendants had reasonable cause to believe that such was the plaintiffs' intention, then these were wagering transactions."

These requests of the plaintiffs were granted.

The defendants asked for and the judge granted the following rulings:

"9. An actual purchase does not become unreal by a subsequent use of the customer's stock by the broker.

"10. An actual purchase does not become unreal by a subsequent use of the customer's stock by the broker, and this is so even if the effect is to make the broker short as to his other customers."

The defendants asked for and the judge refused to grant the following rulings:

"3. All transactions were accompanied by actual payments and delivery of certificates and therefore were not within R. L. c. 99, § 4."

"6. The purchases made by the defendants for the plaintiffs were executed by actual delivery of certificates from the selling broker to the defendants and payment therefor by check, and are actual purchases.

"7. The sales made by the defendants for the plaintiffs were executed by actual delivery of certificates from the defendants to the purchasing broker and payment therefor by check, and are actual sales."

"11. The fact, if it be a fact, that the defendants at the time of the execution of the purchases for the plaintiffs, which were consummated by delivery of certificates and payment therefor by check, did not have enough stock on hand or within their control sufficient to deliver to all their customers does not render the purchases unreal under the laws of New York or Massachusetts.

"12. The fact, if it be a fact, that the defendants at the time of the execution of the sales for the plaintiffs, which were consummated by delivery of certificates and payment therefor by check, did not have enough stock on hand or within their control sufficient to deliver to all their customers, does not render the sales unreal under the laws of New York or Massachusetts.

"13. The fact, if it be a fact, that the defendants not having sufficient stock of their own, used stock of other customers in making delivery on account of a sale of stock which they had sold on account of the plaintiffs' order, will not make the transaction unreal.

"14. The fact, if it be a fact, that the defendants on the same day that they purchased certain stock for the plaintiffs may have

sold stock short for some other customer, will not make the purchase for the plaintiffs unreal.

"15. As the plaintiffs' transactions were not executed through the clearing house, where the purchases of the broker are set off against his sales and neither are executed by actual delivery and payment, and where the actuality of the purchase by the broker depends upon whether or not as a result of it he has in his hands stock to deliver to all his customers for whom he had bought and was carrying the stock, and as instead, subsequent to each order for a purchase or sale which the defendants reported to the plaintiffs had been executed by them (that is, within twenty-four hours, except that sales made the day before a holiday were completed the day after the holiday and sales on Friday or Saturday were completed Monday), certificates for a corresponding number of shares in that stock were delivered by or to the defendants, to or from some other broker and a check received for the price of the stock, such transactions are actual."

The judge found for the plaintiffs in the sum of $1,941.41 upon the fifteen items named in their requests for rulings numbered 1, 2 and 5; and the defendants alleged exceptions.

The case was argued at the bar in January, 1920, before *Rugg*, C. J., *Braley*, *De Courcy*, *Carroll*, & *Jenney*, JJ., and afterwards was submitted on briefs to all the Justices.

W. P. Everts, for the defendants.

W. R. Bigelow, for the plaintiffs.

RUGG, C. J. The plaintiffs, who are husband and wife, seek in this action to recover amounts paid to and dividends received by the defendants, who are stockbrokers, upon certain transactions in stocks alleged to be within R. L. c. 99, § 4. That section is in these words: "Whoever upon credit or upon margin contracts to buy or sell, or employs another to buy or sell for his account, any securities or commodities, intending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made, or the value of anything delivered, on account thereof, if such other party to the contract or person so employed had reasonable cause to believe that said intention existed; but no person shall have a right of action under the provisions of this section if, for his account,

such other party to the contract or the person so employed makes, in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, or a valid contract therefor." The case was sent to an auditor and then was heard upon the auditor's report and other evidence by a judge of the Superior Court without a jury.

It appears that in August, 1915, Mr. Barrell personally began trading in stock on margin with the defendants, but it was not until May 10, 1916, that "he had an affirmative intention that there should be no actual . . . purchase and sale and . . . the defendants had reasonable cause to believe that he had that intent." Mrs. Barrell, whose name first occurs in the account on December 14, 1915, "never had a clear conception of the nature of these transactions, although in a general way she knew about them and authorized her husband's acts," and while she "never had an affirmative intent that there should not be actual purchases and sales . . . she intended to leave the . . . business to her husband." This was sufficient basis for a finding that the husband acted as the agent for his wife and that his intention bound the defendants so far as her interests are affected. *Marks* v. *Metropolitan Stock Exchange,* 181 Mass. 251, 255. *Chandler* v. *Prince,* 214 Mass. 180, 183.

A considerable number of transactions took place between the parties. So far as concerns those upon which the plaintiffs now rely, the contention of the defendants is that the affirmative defence of "actual purchase or sale" of the securities was made out in accordance with the statute. Upon that point the finding of the auditor is: "It is . . . to be noted that all the plaintiffs' transactions with the defendants were orders for the purchase or sale of less than one hundred shares of a particular stock at a given time. Such transactions are called in the trade transactions in 'odd lots' and are not executed through the stock exchange clearing house either in New York or Boston. Ordinarily they are executed by actual delivery of certificates from the selling broker to the buying broker and payment therefor by check. In large offices like that of the defendants, this is the practice even when the same number of shares of the same stock are sold to and bought from another broker on the same day. This is

because in a business as large as that conducted by the defendants the deliveries on sales are carried out by different clerks from those who draw the checks. If the defendants were temporarily without certificates of the requisite denomination and of the required stock, it might happen that a certificate so received would be returned to the same broker it came from. There is no evidence that in any instance in this case there was not a physical delivery of a certificate for the stock bought or sold within the time thereafter permitted by the custom of the business, and I find as a fact that subsequent to each order by the plaintiffs for a purchase or sale which the defendants reported to the plaintiffs had been executed by them (that is within twenty-four hours except that sales made the day before a holiday were completed the day after the holiday and sales on Friday or Saturday were completed Monday), a certificate for the corresponding number of shares in that stock was delivered by or to the defendants to or from some other stockbroker and a check received for the price of the stock. I further find that at all times thereafter during the period covered by the transactions with the plaintiffs, the defendants had on hand or under their control shares in the stocks they purported to be carrying for the plaintiffs equal in number to those to which the plaintiffs were entitled."

This is an explicit finding. It discloses a real and tangible transfer of a full and complete title to an existing, defined and certain security, which actually was delivered to the purchaser pursuant to such transfer. It shows an actual purchase or sale, as those words are used in the statute, respecting every transaction between the plaintiffs and the defendants. It would be too narrow an interpretation of this finding to say that these actual deliveries of certificates found to have taken place in the case of every transaction in which the plaintiffs were concerned did not relate to the orders of the plaintiffs. It seems to us that this finding fairly must be taken to mean that the certificates were delivered in consequence and on account of the plaintiffs' orders. The auditor's report is *prima facie* evidence and requires a judgment in accordance with its findings of facts unless taking all the facts found both primary and subsidiary the report is reasonably susceptible of more than one inference. *Wakefield* v. *American Surety Co.* 209 Mass. 173, 176. See *Peaslee* v. *Ross*, 143 Mass.

275. The force and effect of this definite finding is not broken by other evidence introduced at the trial. Upon this branch of the case the auditor's report was not contradicted nor affected by evidence outside the report. This finding is at least as favorable to the defendants in this particular as those revealed in *Matthys* v. *Hornblower*, 224 Mass. 248.

The auditor's other findings of facts did not shake the force of this one already quoted. In this connection the other findings of the auditor were these: "It appeared, however, that both the defendants and their correspondent New York brokers during the period covered by the plaintiffs' transactions with the defendants, were at various intervals and in substantial amounts 'short' of the stocks which they purported to be carrying for the plaintiffs in the sense that on balancing up their books for the day a balance of such stocks sufficient to meet the demands of all customers then on their books was obtained only by including in the account kept by the defendants to show their resources in such stocks, stocks owed the defendants by other brokers and stocks owed the defendants by other customers for whom the defendants had executed 'short' sales; . . . I find, if it is within my province so to find, that balances so arrived at were so frequent and in such quantities as to characterize the account and indicate a usual course of business of the defendants and Harris, Winthrop and Company. Upon the understanding that as a matter of law short sales of other customers cannot be set off against orders for purchases so as to strike a balance as above described in proving the defence of actual purchases and sales under the above statute, upon the foregoing facts I find, if it is an issue of fact which it is within my province to pass upon, that the defendants did not make actual purchases and sales of the stocks they were ordered by the plaintiffs to buy and sell and carry on margin for the plaintiffs." So far as this is a finding of fact, it is that, taking into account all the transactions of the defendants, they often were short of stocks in which the plaintiffs were speculating, so that they would have been unable to respond to the just demands of all their customers. That circumstance would be of great significance if the defendants were unable to prove a "real and tangible transfer of a full and complete title to an existing, defined and certain security" in response to every order of the

plaintiffs. *Fiske* v. *Doucette*, 206 Mass. 275, at page 283. That circumstance, however, is of no consequence in view of the specific fact found by the auditor, and not contradicted, that in every instance there was an actual transfer of title to and manual delivery of a certificate of stock pursuant to every order for purchase or sale by the plaintiffs. In the presence of that fact, indisputable on this record, relations of the defendants to other customers were immaterial. Such a finding of fact was wholly absent in *Fiske* v. *Doucette*, 206 Mass. 275, *Greene* v. *Corey*, 210 Mass. 536, and *Adams* v. *Dick*, 226 Mass. 46. In each of those cases the defence of actual purchases and sales was sought to be maintained by resort to other kinds of evidence than showing a manual transfer of identified certificates of stock together with complete transfer of title. The defendants in those cases sought to establish the statutory defence by showing transactions upon the stock exchange without other proof of actual purchases or sales. Those transactions, as pointed out in those opinions, and especially in *Greene* v. *Corey*, 210 Mass. 536, at page 548, might have been fictitious and not real. The principles established in those cases were applicable to such facts as there appeared. They are not controlling as to radically different facts here disclosed. It was in reference to the kind of defence put forward in each of those cases that it was said in substance in each of those opinions that the defence allowed by the statute is not made out unless the broker shows that he has under his immediate control certificates of stock sufficient to meet the demands of his customers. The final sentence from the portion of the auditor's report last quoted was not a simple finding of fact but was expressly predicated upon a principle of law sound in itself but not relevant to the definite facts previously found.

It follows that, while the judge rightly granted nine and ten of the defendants' requests for rulings, he erred, in the opinion of a majority of the court, in granting requests 1, 2, 5 and 6 of the plaintiffs.

Exceptions sustained.

ELLEN F. COGHLAN, administratrix, *vs.* JOHN E. WHITE & another.

Suffolk. March 3, 1920. — June 22, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Snow and Ice. Notice. Evidence, Presumptions and burden of proof, Return by constable. *Constable.*

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate, of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact and is for the jury, and is not one upon which the judge could make a final determination.

TORT by the administratrix of the estate of Joanna Coghlan for causing personal injuries to and the death of the plaintiff's intestate, who fell upon the sidewalk in front of premises owned by the defendants on West Seventh Street in that part of Boston known as South Boston. Writ dated April 23, 1917.

In the Superior Court the action was tried before *Quinn,* J. Material evidence and the sole question raised by the exceptions are described in the opinion. By order of the judge, the jury found for the defendants; and the plaintiff alleged exceptions.

St. 1908, c. 305, as amended by St. 1913, c. 324, reads as follows: "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices on injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice. Leaving

the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions: provided, however, that notice within thirty days after the injury shall be sufficient; and if by reason of physical or mental incapacity it is impossible for the injured person to give the notice within thirty days after the injury, he may give it within thirty days after such incapacity has been removed, and in case of his death without having been for thirty days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment. No notice shall be held to be invalid by reason of any inaccuracy or misstatement of the owner's name if it appears that the same was made in good faith and did not prevent or unreasonably delay the owner from receiving actual notice of the injury and of the claim that it occurred from a defective condition of his premises."

J. J. McCarthy, for the plaintiff.

H. A. Leventhal, for the defendants.

RUGG, C. J. This is an action of tort to recover damages for the conscious suffering and death of the plaintiff's intestate caused by slipping upon ice accumulated upon the sidewalk by reason of a leaking and defective spout on an adjacent building belonging to the defendants. As a condition precedent to the right of recovery it was incumbent upon the plaintiff to show that written notice seasonably was given as required by law. *Merrill* v. *Paige*, 229 Mass. 511, 513. It is provided by St. 1908, c. 305, that "Leaving the notice with the occupant of said premises" (that is, premises adjoining the way on which ice has been accumulated wrongfully), shall be a sufficient compliance with the law. To prove that this requirement of the statute had been met, a constable, called as a witness by the plaintiff, testified that he served a notice upon one of the occupants of the building on which was the defective spout whereby the ice accumulated causing the injury. The notice was sufficient in form. *Stefani* v. *Freshman*, 232 Mass. 354. The return of the constable, indorsed on the notice and signed by him, was in these words: "Suffolk, ss. April 21, 1917. I this day served a notice, of which the within is a true copy, by leaving the same with

John Flaherty, the occupant of Suite 2 of the dwelling house No. 54 West Seventh Street, South Boston." The defendants objected to the introduction of this copy and return on the ground that there was no evidence to show that Flaherty was an occupant of the building. Cross-examination of the constable followed. Without narrating it in detail, it is enough to say that he made conflicting statements, the import of some parts being that Flaherty was then living there and of other parts that he had no knowledge on the subject. Later the person in charge of the premises for the owners and Flaherty were called as witnesses, and both testified that Flaherty was an occupant of the suite upon the second floor of the premises in question, in which there were three suites or apartments. Flaherty and the agent each testified that no notice whatever was served on him by the constable or any one else, and that he received no notice in writing. The judge finally excluded the notice and then as a necessary consequence of that ruling ordered a verdict for the defendant. The only question presented is whether there was error of law in the exclusion of the notice.

Manifestly it was a question of fact whether the notice was served as required by the statute. The admissibility in evidence of the notice depended upon the point whether it had been so served. It is contended that that was a preliminary question of fact which must be determined by the judge and that his decision is conclusive. There is a large class of cases where the admissibility of evidence depends upon some preliminary finding by the judge which is final and cannot be reviewed. That principle finds numerous illustrations in our decisions. In *Gorton* v. *Hadsell*, 9 Cush. 508, the admissibility of certain records depended upon the question whether a written application to a justice of the peace to call a meeting had been signed by five proprietors of a meeting-house. Evidence tending to prove that proposition was introduced, but the judge refused to submit it to the jury because he was of opinion that it was his duty to determine the sufficiency of the evidence as a preliminary matter and he was not satisfied that such proprietorship was shown. In reviewing this ruling it was said at page 511: "it is the province of the judge, who presides at the trial, to decide all questions on the admissibility of evidence. It is also his province to decide any

preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility. . . . And his decision is conclusive, unless he saves the question for revision by the full court, on a report of the evidence, or counsel bring up the question on a bill of exceptions which contains a statement of the evidence." When the case is presented to this court on exceptions, the question is purely one of law and the findings are conclusive unless the excepting party establishes that they were based on an erroneous view of the law. *Boston Safe Deposit & Trust Co.* v. *Bacon*, 229 Mass. 585, 588. *Commonwealth* v. *Bishop*, 165 Mass. 148, 152. *Maynard* v. *Royal Worcester Corset Co.* 200 Mass. 1, 3. The duty of weighing evidence and of finding facts in actions at law is not an appropriate function of a court of last resort. *Atlantic Maritime Co.* v. *Gloucester*, 228 Mass. 519, 522. That principle has been applied to the determination by the trial judge of the interest of a witness, *Dole* v. *Thurlow*, 12 Met. 157; of the voluntary nature of confessions, *Commonwealth* v. *Russ*, 232 Mass. 58, pages 69 to 71, and cases there collected; of the existence of agency as the basis for the admission of a conversation by a witness as binding on a party, *Dexter* v. *Thayer*, 189 Mass. 114; of the fact of authority by an alleged agent to write a letter offered as binding a party, *Hathaway* v. *Congregation Ohab Shalom*, 216 Mass. 539, 544; of the authenticity of rules of a corporation, *Dixon* v. *New England Railroad*, 179 Mass. 242, 246; of the point whether oral statements are part of one conversation, *Commonwealth* v. *Russell*, 160 Mass. 8; of the point whether declarations were made with the consciousness and in view of impending death, *Commonwealth* v. *Reagan*, 175 Mass. 335, 337, *Commonwealth* v. *Turner*, 224 Mass. 229, 235, *State* v. *Monich*, 74 Vroom, 522, 526; of the question, whether a declaration by a deceased person, offered in evidence under R. L. c. 175, § 66, was made in good faith before the commencement of the action and upon the personal knowledge of the declarant, *McSweeney* v. *Edison Electric Illuminating Co.* 228 Mass. 563, *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318, 320, *Bodfish* v. *Cross*, 235 Mass. 428; of the competency of a witness to understand the nature of an oath, *Commonwealth* v. *Marshall*, 211 Mass. 86, 90, *Commonwealth* v. *Teregno*, 234 Mass. 56; of the identity

of handwriting as a standard for comparison, *Commonwealth* v. *Tucker*, 189 Mass. 457, 474; of the qualification of a witness as an expert, *Commonwealth* v. *Spencer*, 212 Mass. 438, 448, *Nunes* v. *Perry*, 113 Mass. 274; of the relevancy of experiments, *Baker* v. *Harrington*, 196 Mass. 339, 341, and of the instructiveness and pertinency of photographs, *Wilcox* v. *Forbes*, 173 Mass. 63, *Field* v. *Gowdy*, 199 Mass. 568, 574. In *Gila Valley, Globe & Northern Railway* v. *Hall*, 232 U. S. 94, at page 103, the question arose whether the plaintiff received notice of a defective wheel and hence assumed risk of the injury which he subsequently received. Whether he did receive such notice depended upon the further question whether he heard a conversation which occurred within twenty yards of him. The trial judge excluded evidence of the conversation on the ground that he was not satisfied that the plaintiff heard it. It there was said, with ample citation of authorities, "Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence." See also *Commonwealth* v. *Robinson*, 146 Mass. 571, 580–584; *Walker* v. *Curtis*, 116 Mass. 98; *O'Connor* v. *Hallinan*, 103 Mass. 547; Wigmore on Evidence, § 2550.

On the other hand cases arise where it appears that the decision of the judge on such a preliminary question is erroneous in law and must be reversed. *Muskeget Island Club* v. *Nantucket*, 185 Mass. 303. *Foster* v. *Mackay*, 7 Met. 531, 538. *Ames* v. *New York, New Haven, & Hartford Railroad*, 221 Mass. 304, 306.

The return of the officer in the case at bar concerning the service of the notice was *prima facie* evidence of the facts therein stated. R. L. c. 25, § 91. *Whitney* v. *Lowell*, 151 Mass. 212. *Prima facie* evidence means evidence which standing alone and unexplained maintains the proposition and warrants "the conclusion to support which it is introduced." *Emmons* v. *Westfield Bank*, 97 Mass. 230, 243. *Chandler* v. *Prince*, 217 Mass. 451, 454. It is not conclusive. It may be met and overcome by other evidence.

Whether the notice here in question had been given or not depended in its last analysis on the point whether the return of

the constable or the testimony of Flaherty was true. Whether the *prima facie* effect of the return of the constable was overcome by other evidence was a question of fact upon a vital issue between the parties. Under the circumstances it presented a matter for the jury on which the judge could not make a final determination. *Turner* v. *Williams*, 202 Mass. 500, 505. *Marston* v. *Bigelow*, 150 Mass. 45, 53. *Boyden* v. *Lamb*, 152 Mass. 416, 420.

Exceptions sustained.

CATHERINE M. KIRBY *vs.* WARREN TIRRELL.

Worcester. May 17, 1920. — June 22, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Landlord and Tenant, Landlord's obligation to repair.

The obligation of the landlord of a two-family tenement house to a tenant and his invited guests relating to repair of a piazza used in common by the tenants, where no express agreement on the subject has been made, is that he shall exercise due care to keep the piazza in such condition as, to a person of ordinary observation, it would appear to be in at the time of letting.

Where, at the trial of an action by a guest of a tenant in a two-family tenement house against the landlord for personal injuries received when a board of a piazza, used in common by the tenants, broke as the plaintiff stepped upon it, there is no evidence to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or at any time before the accident to the plaintiff, it is proper to order a verdict for the defendant.

At the trial of the action above described, it appeared that the accident to the plaintiff happened seven months after the tenant began his tenancy. The defective board, which was introduced in evidence, was twenty-two inches long and three and a half inches wide and, on the under surface at the end toward the street where it rested upon a crosspiece, was somewhat decayed, the remaining portions of it being in sound condition. It did not appear that any other part of the piazza flooring was defective, and there was no evidence, expert or otherwise, as to what caused the local decay in the board or how long it had existed. *Held*, that there was no evidence warranting a finding that the defective board was not in the same condition as to safety as it appeared to be in at the time of the letting, or a finding that, by exercising ordinary diligence, the defendant could have discovered or remedied the defect before the accident.

TORT for personal injuries received when a board of the outside piazza of a two-family tenement house owned by the defendant

broke as the plaintiff, who was upon the premises at the invitation of a tenant, stepped upon it. Writ dated September 14, 1917.

In the Superior Court the action was tried before *Hammond*, J. It appeared that one Grandmont, who invited the plaintiff to the premises, had become the defendant's tenant in May, 1916, and that the accident to the plaintiff happened in December, 1916. Other material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

S. D. Vincent, for the plaintiff.

F. P. Garland, for the defendant.

De Courcy, J. The defendant was owner of a two-family tenement house, the approach to which consisted of a flight of outside steps and a piazza leading to the front door. On December 12, 1916, the plaintiff came to the house on the express invitation of the upstairs tenant, Fred Grandmont; and "there was evidence that she was injured by reason of breaking through a board of the piazza with her left foot as she stepped on to the piazza to enter the house." The board did not break into separate pieces, but the end on which she stepped went down, and "she became fast, just below the knee, in the hole, where the board gave way." The trial judge ordered a verdict for the defendant.

The controlling question presented is whether there was sufficient evidence to entitle the plaintiff to go to the jury on the issue of the defendant's negligence. The piazza upon which the plaintiff was injured was used in common by the tenants, and remained in the control of the defendant landlord. His duty to the tenant Grandmont, and concededly to the plaintiff as the tenant's invitee, was "that of due care to keep it in such condition as it was in, or purported to be in, at the time of the letting," which was in May, 1916. *Quinn* v. *Perham*, 151 Mass. 162, 163. This phrase was defined in *Andrews* v. *Williamson*, 193 Mass. 92, 94, as meaning "such condition as it would appear to be to a person of ordinary observation, and has reference to the obvious condition of things existing at the time of the letting." And, as the court adds (page 95), "if the defect of which the plaintiffs complain was obvious at the time of the letting, then the defendant was not liable."

The plaintiff wholly failed to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or indeed at any other time before the accident. So far as the record discloses, it had undergone no change during the intervening six months. The only evidence as to the nature of the alleged defect is that presented by the appearance of the board, which was introduced as an exhibit. At the present time the end that was toward the street, and which presumably rested upon a crosspiece, is somewhat rotted and decayed; but the remaining portions of the board are in sound condition. It does not appear that any other part of the piazza flooring was defective. There was no expert or other testimony as to what caused this local decay, or how long it had existed. The board is about three and a half inches wide and twenty-two inches long. The decayed portion is mainly on the under surface, where apparently it could not be seen even by inspection from underneath the piazza, but only by taking up the board. There was affirmative testimony that the defendant's attention never was called "to anything about that piazza" since it was repaired six or seven years before. It does not appear whether this flooring was protected by a roof; and the only evidence that water ever was on it, is that "the eaves trough in December, 1916, [the month of the accident] overflowed, allowing the accumulated rainwater to fall upon the piazza." While the facts of the accident furnished some evidence that the board or its support was in a defective condition at that time, a jury could not say on the evidence presented that the board was not in the same condition as to safety that it appeared to be in when the plaintiff's invitor became a tenant. Further, even if at the time of the letting the board was apparently safe while unsafe in fact, the plaintiff's contention that by exercising ordinary diligence the defendant would have discovered and remedied the defect before the accident, is unsupported by evidence. *Lynch* v. *Swan*, 167 Mass. 510. Assuming all other issues in her favor, the plaintiff failed to prove that the defendant was guilty of negligence.

Exceptions overruled.

MICHAEL CONNOLLY *vs.* BOSTON ELEVATED RAILWAY COMPANY. ABRAHAM SOLOMON *vs.* SAME.

Suffolk. May 17, 1920. — June 22, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Negligence, In use of highway, Street railway.

At a trial of an action against a street railway company for personal injuries, received in 1917 when a horse drawn wagon which the plaintiff was driving was run into by an electric street car operated by the defendant, there was evidence tending to show that, previous to the accident, the street car was running down hill at a speed of twenty miles an hour northerly on the more easterly of two tracks upon a street in a city, that the plaintiff was driving his horse at an ordinary trot westerly toward the track on an intersecting street with a steep descending grade, that when his horse was on the track he "looked out" and "saw the car forty paces away from . . . [him] forty feet," that he thought that he could "push . . . [his] way across by the time," that owing to the steep grade of the street, he could not back the team, and that the street car struck the front wheels of the wagon. There also was evidence that, in violation of rules of the defendant, no bell was sounded nor other warning given of the approach of the street car. *Held*, that

(1) In the absence of other evidence as to the surrounding circumstances, it could not be said as a matter of law that negligence of the plaintiff contributed to cause his injury;

(2) Findings were warranted that the street car was negligently operated at an excessive speed and without warning signals;

(3) No reason appeared for not applying the general rule that, at the trial of an action for personal injuries or property damage due to a collision between an electric street car and a team at intersecting streets, the questions of due care on the part of the plaintiff and of negligence on the part of the motorman are for the jury.

TWO ACTIONS OF TORT, the first for personal injuries and the second for damages to a horse and wagon resulting from a collision on October 23, 1917, between the team, which was being driven by the plaintiff in the first action, and an electric street car of the defendant. Writs dated March 19, 1918.

In the Superior Court the actions were tried together before *Hammond*, J. The material evidence is described in the opinion.

At the close of the plaintiffs' evidence, the judge ordered a verdict for the defendant in each action and reported them for

determination by this court with "the stipulation of the parties that if, in either case, the plaintiff should have been allowed to go to the jury, and the order directing the verdict was wrong, judgment shall be entered as follows:" for the plaintiff in the sum of $300 in the first action and for the plaintiff in the sum of $100 in the second action.

The cases were submitted on briefs.

J. W. Tushins, for the plaintiffs.

H. S. MacPherson, for the defendant.

CROSBY, J. These are two actions of tort, the first to recover for personal injuries, the second for damage to property. The plaintiff Connolly was injured while travelling with a horse and wagon belonging to his employer, Solomon, by reason of a collision of the wagon and an electric car of the defendant at the intersection of Warren and Maywood streets, in the city of Boston.

Warren Street at the place of the accident runs in a northerly and southerly direction, and on it were two tracks of the defendant; from the easterly side it is entered by Maywood Street at a steep descending grade. The plaintiff Connolly (who will hereafter be referred to as the plaintiff) drove out of Maywood Street, and his wagon was struck by a north bound car; the tracks at this point are down hill in the direction in which the car was travelling. The plaintiff testified that as he drove down Maywood Street the horse was going at an ordinary trot; that he stopped at the corner of the street and "looked out saw the car forty paces away from . . . [him] forty feet. The horse was already on the track and . . . [he] thought . . . [he] could push . . . [his] way across by the time;" that when the horse got to the track he could not back the team because of the steep grade up Maywood Street; and that the car struck the front wheels of the wagon.

The evidence of the plaintiff is to the effect that he thought he had time to cross the track. It cannot be said as matter of law that his judgment was reckless or that he attempted to cross without any regard for his safety. *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232. *Farris* v. *Boston Elevated Railway*, 210 Mass. 585.

Although a plan seems to have been referred to and testimony received with reference to it at the trial, it is not before us, and

it does not appear from the record whether the plaintiff could have seen the approaching car before his horse reached the track or whether his view was obstructed, on what part of Warren Street the tracks were laid, nor what the distance was from the easterly line of Warren Street to the inbound track. In these circumstances, it cannot be held as matter of law that the plaintiff should have looked for a car before his horse reached the track; nor that if he had so looked, he could have known of its approach. These were questions of fact for the determination of the jury upon the evidence before them. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519. *Driscoll* v. *Boston Elevated Railway*, 223 Mass. 533. *Davis* v. *Worcester Consolidated Street Railway*, 234 Mass. 297.

There was evidence that the car was running down grade at the time of the accident at a speed of twenty miles an hour, and that no bell was sounded or other warning given as it approached Maywood Street, as called for by the defendant's rules; upon this evidence the jury could have found that the motorman was negligent in operating his car at an excessive and unreasonable rate of speed at that time and place, and was negligent in failing to give the signals required.

The general rule where a collision occurs between an electric car and a team at intersecting streets is to leave the questions of due care on the part of the plaintiff and of negligence on the part of the motorman to the jury. There seems to be no reason why that rule should not apply in the case at bar. *Halloran* v. *Worcester Consolidated Street Railway*, 192 Mass. 104. *Farris* v. *Boston Elevated Railway*, *supra*.

The case is distinguishable in its facts from *Hurley* v. *West End Street Railway*, 180 Mass. 370, and *Ferguson* v. *Old Colony Street Railway*, 204 Mass. 340, relied on by the defendant.

In accordance with the report, judgment is to be entered for the plaintiff in the first case, for $300; and for the plaintiff in the second case, for $100.

So ordered.

FRANCIS P. NASH & another, trustees, *vs.* ELIOT STREET GARAGE COMPANY.

Suffolk. May 17, 1920. — June 22, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Way, Private: extinguishment. *Easement*. *Deed*, Construction.

The owners of Boylston Place, a private way, which in 1853 was in a small and exclusive residential neighborhood in close proximity to the business section of Boston and ran southerly from Boylston Street toward, but not to, Eliot Street and was closed at the Eliot Street end, conveyed to the owner of land on Eliot Street and to his heirs and assigns "but as appurtenant, however, to that portion of his estate on Eliot Street in Boston which lies north of a line which is forty feet distant northerly from and parallel to the north line of said Street, a free right of way and passage in common with them [the grantors] and their heirs and assigns over Boylston Place, so called, to and from that portion of his said estate which is above specified to Boylston Street the Carriageway & the Sidewalks in said place to be used as such and in no other manner and as the same now exist and to be continued of uniform width by said" grantee. Conditions of the conveyance were that the grantee should extend the way to the point forty feet from Eliot Street and there should build a brick building effectually blocking any use of the way from Eliot Street "or any other street or place," that he should erect brick dwelling houses on each side of the extension of the way of the same class as those then on the way, that, until such dwelling houses on one side of the way should be ready for occupancy, a brick wall then at the southerly end of the way should not be removed and a fence should be maintained in front of each vacant lot of the grantee, "so as effectually to exclude all passage to or from the same over Boylston Place, so that none but the occupants of the new buildings, so to be erected on said Place shall ever be able to avail themselves of any of the privileges hereby conveyed." Such brick dwelling houses were erected. After a successor in title of the grantor of the easement had registered his title subject to the rights given by the indenture, the brick dwelling houses erected by the grantee were torn down by his successor in title, whereupon the certificate holder filed a petition under R. L. c. 128, § 107, to amend the certificate by striking out a provision that the grantee's successor was entitled to any right of way in Boylston Place. *Held*, that

(1) By the last clause quoted above, the right of way expressly and intentionally was limited to the occupants of the dwelling houses to be erected;

(2) The dwelling houses having been destroyed, the right of way was extinguished;

(3) The last clause quoted above could not reasonably be construed as a temporary provision in regard to fencing lots which for a short period might be vacant before the houses were built.

A grammatical construction of a clause in a deed will not control the manifest intention of the parties as expressed in the whole instrument if that intention is consistent with the rules of law.

PETITION, filed in the Land Court on December 3, 1919, under R. L. c. 128, § 107, for the amendment of a certificate of the title to land on Boylston Place in Boston, which stated that "So much of the above described land as is included within the limits of what is shown as Boylston Place on said plan, is subject to the rights of way and drainage set forth in an indenture between John James Dixwell et als., dated September 30, 1853, duly recorded in Book 654, Page 90, in favor of said Apsey land, which is the land shown as such on a plan filed in the Land Registration Office in Case No. 5991." The "Apsey land," the petitioners alleged, was that formerly owned by the Brackett to whom rights of way were given by the indenture described in the opinion. After the decree, upon which the petitioners' certificate of title was founded, was entered, the "Apsey land" was conveyed by mesne conveyances to the respondent. The amendment prayed for was the striking out, from that portion of the words above quoted, of the words, "way and" before the word "drainage," and of the words, "in favor of said Apsey land, which is the land shown as such on a plan filed in the Land Registration Office in Case No. 5991."

The title to the "Apsey land" originally was registered by a decree following the decision reported in *Apsey* v. *Nash*, 229 Mass. 77, wherein the indenture, which is the basis of this decision, also was considered; and the petitioners herein alleged that that decree and the respondent's "certificate founded thereon, do not register or mention the easement above described as appurtenant thereto, and no amendment of said certificate is necessary."

In the Land Court the petition was heard by *Davis*, J. Material facts found by him are described in the opinion.

At the close of the evidence, the respondent asked for the following rulings:

"1. That the indenture between John James Dixwell et al. and Jeffrey R. Brackett, dated September 30, 1853, created an easement for the benefit of said Brackett's land.

"2. That the easement created by said indenture was appurtenant to said land of Brackett and as an appurtenant right passed with the conveyance of said Brackett's land.

"3. That the destruction of the buildings on the premises referred to in said indenture did not terminate said easement.

"4. That the language of said indenture is not such as to limit the duration of said easement and was not an easement established for the personal benefit of said Brackett.

"5. That so much of the respondent's land as is described or referred to in said indenture has the benefit of said easement and that said easement has not ceased to exist and is still a right appurtenant to said respondent's land."

The rulings were refused, and a decree was ordered amending the certificate as prayed for; and the respondent alleged exceptions.

The case was submitted on briefs.

Roland Gray, A. Boyden & W. M. Quade, for the respondent.

G. L. Wilson, for the petitioners.

C. S. Rackemann & J. Sargent, by leave of court filed a brief on behalf of the Tavern Club as *amicus curiae.*

CROSBY, J. This is a petition in the Land Court under R. L. c. 128, § 107, to amend the certificate of title of the petitioners by striking therefrom those parts that subject their land to a right of way over Boylston Place, so called, in Boston, and which way is alleged by the respondent to be appurtenant to its land.

The instrument creating the right of way is in the form of an indenture, dated September 30, 1853, between Dixwell and others and Brackett. Boylston Place is a private way running southerly from Boylston Street between, and in the same general direction as, Tremont and Carver streets. The respondent, who is the successor in title to Brackett, is now the owner of the land at its lower or southerly end; upon this land ten brick dwelling houses stood which abutted on the way, five on each side. The petitioners, who are successors in title to Dixwell and others, own a parcel of land which abuts on Boylston Place at its entrance from Boylston Street and includes part of the fee in the way.

By the indenture Dixwell and others, the grantors, remised, released and forever quitclaimed to Brackett "and his heirs and assigns but as appurtenant, however, to that portion of his estate on Eliot Street in Boston which lies north of a line which is forty feet distant northerly from and parallel to the north line of said Street, a free right of way and passage in common with them and their heirs and assigns over Boylston Place, so called, to and from that portion of his said estate which is above specified to Boylston

Street the Carriageway & the Sidewalks in said place to be used as such and in no other manner and as the same now exist and to be continued of uniform width by said Brackett: — But this conveyance is made upon the following conditions:" then follow three conditions. The first provides in part that Boylston Place is to be extended to a line forty feet distant from Eliot Street at the sole cost of Brackett, but is never to be continued through to Eliot Street; that Brackett will build a brick building opposite the end of the way, fronting on Eliot Street, and not more than forty feet in depth, without any opening on to or passageways leading therefrom into Boylston Place, "the object being to prevent as far as possible a street or common passageway from being, ever, made over Boylston Place to connect Boylston Street with Eliot Street, or any other street or place." The second condition provides that Brackett shall lay a drain through Boylston Place and across his land to Eliot Street for the use of the estates of the other abutters on the place. The third condition is as follows: "that said Brackett or his representatives shall also erect not more than ten brick dwelling houses fronting on said place as continued, five on each side as of good style and of such class as shall accommodate occupants like those now occupying said place, that no materials, for building the same, shall be carried over the place as it now exists and that until such houses are erected on one side of the place as continued and fit for occupancy, the brick wall at the foot of the present place is not to be removed: And as all the houses may not be immediately erected the said Brackett or his representatives shall before every vacant lot erect and maintain a substantial fence, so as, effectually, to exclude all passage to or from the same over Boylston Place, so that none but the occupants of the new buildings, so to be erected on said Place shall ever be able to avail themselves of any of the privileges hereby conveyed." The ten brick dwelling houses were erected by Brackett shortly after 1853, and recently were torn down voluntarily by the respondent.

The question is, what is the meaning of the language used in the indenture creating the right of way. Was it a right of way for the benefit solely of the occupants of the dwelling houses to be erected, and which came to an end when the houses were demolished? Or was it in effect an absolute grant of a way appurte-

nant to the land on which the houses stood? The determination of the question depends on the intention of the parties as found in the words used to express their meaning as applied to the subject matter. *Codman* v. *Evans*, 1 Allen, 443. *Simonds* v. *Simonds*, 199 Mass. 552. *Cotting* v. *Boston*, 201 Mass. 97.

The record shows that in 1853, when the easement was created, Boylston Place was a small and exclusive residential neighborhood in close proximity to the business section of Boston, and that Eliot Street was of a different character. The judge of the Land Court found that "the dominant intention of the parties was to preserve the exclusive character of the small residential locality then existing at Boylston Place. The confines of that locality were to be enlarged by the addition of a strip of land from the south, which was to be occupied by brick dwelling houses 'as of good style and of such class as shall accommodate occupants like those now occupying said place.' That was the only specification. It was the character of the occupants with which the parties were chiefly concerned, and the rights of way were to be so limited by physical barrier that 'none but the occupants of the new buildings so to be erected on said Place shall ever be able to avail themselves of any of the privileges hereby conveyed.'"

The cases heretofore decided by this court relating to equitable restriction are analogous in principle to those relating to easement: each is a property right in the estate to which it is appurtenant. *Peck* v. *Conway*, 119 Mass. 546. *Sprague* v. *Kimball*, 213 Mass. 380, 382. *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242.

It is apparent from the language of the indenture that the petitioners' predecessors were desirous there should never be any passageway between Boylston and Eliot streets through Boylston Place. But that is not all they sought by the indenture to accomplish. They also meant to designate and define the character of the occupants when they provided that the houses to be erected should be "as of good style and of such class as shall accommodate occupants like those now occupying said place." Manifestly in the extension of the way to the south the grantors intended to continue to preserve and protect the neighborhood for residential purposes by providing that the occupants of the houses to be built should be of the same class as those living there

at that time. While in the granting clause of the indenture the right of way was conveyed in fee and appurtenant to the land, we are of opinion that by the last clause before the testimonium clause it was expressly and intentionally limited to the occupants of the ten houses to be erected. When it was provided that none but the occupants of the new buildings so to be erected should ever be able to use the right of way, it is plain it was the intention of the grantors that the buildings referred to were the ten brick buildings to be erected by Brackett and that when by the destruction of those buildings there could be no more occupants, the right of way would be extinguished. In *Cotting* v. *Boston, supra*, the conveyance was of a lot of land "with the store thereon standing . . . with a privilege in the passage of the adjoining store, for the purpose of passing and repassing to the chambers of the store hereby conveyed." It was held that the privilege of passage ceased when the building upon the land conveyed was destroyed and that it did not attach to the land of the dominant estate. *Boston Baptist Social Union* v. *Boston University*, 183 Mass. 202. *Welch* v. *Austin*, 187 Mass. 256.

The last clause cannot reasonably be construed as a temporary provision in regard to fencing lots which for a short period might be vacant before the houses were built. It expressly and intentionally provides that none but the occupants of the new buildings shall ever be able to avail themselves of any of the privileges conveyed under the terms of the indenture. It is the contention of the respondent that the last clause is a summary of the effect of previous provisions without in any way restricting their scope or adding any new element, that it follows the words "so that" which grammatically construed necessarily introduce a statement of the purpose or effect of the preceding provisions. We are unable to agree with this contention. Although in a written instrument the words used ordinarily must be construed in their usual and grammatical sense unless that would lead to some absurdity, repugnance or inconsistency, *Grey* v. *Pearson*, 6 H. L. Cas. 61, 106, *Cotting* v. *Boston, supra*, still a grammatical construction will not control the manifest intention of the parties as expressed in the instrument if that intention is consistent with the rules of law. *Frost* v. *Spaulding*, 19 Pick. 445, 446. *Packard* v. *Old Colony Railroad*, 168 Mass. 92, 96.

It is argued by the respondent that to limit the way to the occupants of the buildings erected by Brackett would eventually leave the lot on which they stood without any approach; but that result cannot control the proper construction of the instrument by which the rights of the parties are established. It appears that the buildings which were erected in accordance with the agreement were substantial in character and stood on the land for nearly seventy years, and there is nothing in the record to show that when they were torn down by the respondent they might not have been occupied for residential purposes for an indefinite period.

It results that the respondent's requests for rulings were rightly refused. The decision of the Land Court is affirmed.

So ordered.

ETTA E. KNIBBS, executrix, *vs.* JOHN W. KNIBBS, JR., & others.

Worcester. May 22, 1920. — June 22, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Devise and Legacy, Estate in fee or for life. *Trust*, What constitutes.

A will in the handwriting of the testator read as follows: "I . . . being of sound mind and know what I want, do hereby bequeath to my dear wife all of my property real and personal . . . to have and to hold, spend whatever pleases her. After her death whatever may be left, leave to my only sister's child . . . five hundred dollars. The rest to be equally divided between our dear children or their heirs. . . . If in the judgment of my dear wife she deems it best, furnish money to put our grandson . . . through Dartmouth College." *Held*, that

(1) The testator's widow received an absolute estate in the real and the personal property;

(2) The provisions as to persons other than the widow were to be interpreted as expressive of a desire and request which did not affect the absolute estate given to the widow;

(3) The persons other than the widow had no right under the will enforceable either at law or in equity.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 19, 1920, by the executrix of the will of John W. Knibbs, late of Worcester, for instructions.

This will was in the handwriting of the testator and, exclusive of the signature, read as follows:

"Worcester, Mass., Dec. 27, 1910.

"Be it known to all men, that I, John W. Knibbs, being of sound mind and know what I want, do hereby bequeath to my dear wife all of my property real and personal, my wife to pay all of my just debts, she shall not furnish a bond, simply pay all just bills, and collect all bills due me, to have and to hold, spend whatever pleases her.

"After her death whatever may be left, leave to my only sister's child, Bessie Sherman five hundred dollars.

"The rest to be equally divided between our dear children or their heirs, Chas. H. — John W. Jr. and Lila I.

"If in the judgment of my dear wife she deems it best, furnish money to put our grandson C. C. through Dartmouth College.

"This is my last will and testament."

The suit was reserved by the Chief Justice upon the petition and answers for determination by the full court.

The case was submitted on briefs.

H. L. Parker, for the plaintiff.

W. E. Sibley, C. M. Blair & B. Young, for the defendant J. W. Knibbs, Jr.

W. A. White, guardian *ad litem* for C. C. Knibbs and others.

CROSBY, J. This is a bill in equity for instructions as to the disposition of the estate of John W. Knibbs, whose will is dated December 27, 1910. It is the contention of the plaintiff that, under the will, she takes absolutely all the real and personal property owned by the testator at the time of his decease. The defendant John W. Knibbs, Jr., claims that the plaintiff takes the use and income of the estate for life with power to spend so much of the principal as may be necessary for her personal needs and pleasure, that she takes all the property in trust, and that it is her duty to qualify as trustee.

The concise and emphatic language of the will, which is in the handwriting of the deceased, shows that he had a definite and clear purpose in mind respecting the disposition which he desired to make of his entire estate. He states "I . . . know what I want, [and] do hereby bequeath to my dear wife all of my

property real and personal, . . . to have and to hold, spend whatever pleases her." The widow is not limited in her authority to use the principal or such part of it as may be reasonably necessary for her comfort and support but is entitled to "spend whatever pleases her." No restriction is placed upon her power to expend the principal for any purpose she may desire.

The provision that she is "to have and to hold" the entire estate and to "spend whatever pleases her," in the absence of limiting words, creates an absolute ownership in real estate, R. L. c. 135, § 22, *Dorr* v. *Johnson*, 170 Mass. 540, *Bassett* v. *Nickerson*, 184 Mass. 169, and in personal property, because under a life estate she could not "spend whatever pleases her" if the right to do so were subject to the authority of a court, or depended upon what was reasonably necessary for her comfort and support, in view of the subsequent provisions relating to the disposition of the possible unexpended property at her death. By the true construction of the will the testator's widow takes title in fee to the real estate and an absolute ownership of the personal property. *Kelley* v. *Meins*, 135 Mass. 231. *Joslin* v. *Rhoades*, 150 Mass. 301. *Davis* v. *Davis*, 225 Mass. 311.

The language used is distinguishable from that under consideration in *Chase* v. *Ladd*, 153 Mass. 126, *Kent* v. *Morrison*, 153 Mass. 137, *Dana* v. *Dana*, 185 Mass. 156, *Allen* v. *Hunt*, 213 Mass. 276, and *Kemp* v. *Kemp*, 223 Mass. 32.

The remaining clauses are not inconsistent with the conclusion reached. The gifts to his sister's child and to his own children, and the suggestion for the education of his grandson, in view of the earlier provision for his wife do not affect the absolute interest given to her. They are to be interpreted as expressions of a desire and request that his wife will carry out his wishes, but they are in harmony with his belief that at her death there might remain some part of the estate, which he would like the persons named to have as indicated, if such disposition did not destroy the absolute gift to his wife under the first paragraph of his will. *Hess* v. *Singler*, 114 Mass. 56. *Poor* v. *Bradbury*, 196 Mass. 207. *Dexter* v. *Young*, 234 Mass. 588.

The plaintiff is instructed (1) that as widow she took an absolute estate in the real and personal property; and (2) that neither defendant under the will has any right enforceable in law or equity.

So ordered.

ARIZONA COMMERCIAL MINING COMPANY *vs.* IRON CAP COPPER COMPANY.

SAME *vs.* SAME.

Suffolk. March 11, 12, 1920. — June 23, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Jurisdiction, Local action. *Mineral Lands*. *Constitutional Law*, Equal protection of the laws, Equal privileges to citizens of different States.

In the declaration in an action of contract or tort between two mining corporations not incorporated in this Commonwealth, the plaintiff alleged that it owned certain mining properties in the State of Arizona and had the right to take ore from every vein, lode and ledge having its apex inside the surface lines of the plaintiff's land extended downward and throughout their entire depth although they might so far depart from the perpendicular as to extend outside of the side lines of such surface boundaries; that the defendant had taken ore from veins, lodes and ledges which had their apexes within the plaintiff's surface boundaries and had received money therefrom. The declaration excluded any claim for damage to the plaintiff's realty and was drawn for conversion of the ore as personal property and for money had and received from its sale as personal property. In an answer in abatement the defendant alleged that it had not taken any ores except from real estate to which in good faith and at all times openly and to the knowledge of the plaintiff it had claimed ownership and title, that such ore as it had taken had been from veins, lodes and ledges under lands and claims owned by it and within their surface boundaries extended downward vertically, that it at all times had been in possession of the entire surface of such lands and of the mining operations beneath the surface to the complete exclusion of the plaintiff, and that its extraction of the ore had been open, to the plaintiff's knowledge and under a claim of title made in good faith. The answer in abatement was heard upon the understanding of the judge and the parties that, for the purposes of the hearing, the facts therein alleged were assumed to be proved. *Held*, that

(1) The record presented a cause arising out of a *bona fide* dispute as to the title to real estate, where the primary question involved was the title;

(2) The courts of this Commonwealth will not take jurisdiction of such an action, it being one local to the State of Arizona;

(3) Such a determination violates no constitutional right of the plaintiff given either by art. 14 of the Amendments to the Federal Constitution, or by art. 4, § 2, of that Constitution.

The rule that, where a trespasser severs wood, gravel or other parts of the realty from land and transfers it into money, the owners of the land may waive the trespass and maintain an action of contract against the wrongdoer for money had and received, does not apply where the owner has been disseised or where there is an honest controversy between the parties as to who is the owner of the

land; but in such circumstances the owner must seek to enforce his rights in a court vested with jurisdiction to try the title to the land as a local action.

Statement by RUGG, C. J., of the reasons for the distinction between local and transitory actions.

The courts of this Commonwealth will not take jurisdiction of an action of contract under §§ 4047, 4048 and 4051 of the Rev. Sts. of the State of Arizona (1913), between the owners of adjacent mines in that State, to compel the payment of a proportionate part of the expense of pumping water from the defendant's mine, such action being local in its character.

CONTRACT or TORT, (hereinafter called "The Ore Action") begun by trustee process, by a corporation incorporated under the laws of the State of Maine and having a usual place of business in Boston against a corporation also organized under the laws of the State of Maine and having a usual place of business in Boston, the subject matter of the action being a controversy as to the ownership of certain ore extracted by the defendant from mines in the State of Arizona. Writ dated September 23, 1919. Also an action of

CONTRACT, (hereinafter called "The Water Action") by the same plaintiff against the same defendant under a statutory provision of the State of Arizona, quoted below, for a proportion of the expense of pumping water from the defendant's mines in Arizona, which were adjacent to the plaintiff's. Writ dated September 23, 1919.

The defendant filed an answer in abatement and a demurrer in each action. The pleadings are described in the opinion.

The actions were heard together by *Hammond*, J., upon the defendant's demurrers and answers in abatement without the introduction of any evidence, and upon the understanding of the judge and the parties that for the purpose of this hearing the facts alleged in the answers in abatement were assumed to be proved.

The judge sustained the demurrers, adjudged the answers in abatement good and ordered that the actions be dismissed for want of jurisdiction; and the plaintiff alleged exceptions.

Rev. Sts. of Arizona of 1913, §§ 4047, 4048 and 4051, were alleged in the declaration and in the answer in abatement in "The Water Action" to be as follows:

"Section 4047. Whenever adjacent or contiguous mines, occupied and worked upon the same or upon separate lodes have a

common ingress of water or by reason of subterranean communication of water have a common drainage, it shall be the duty of the owners, lessees or occupants of said mines so related to provide for their proportionate share of such drainage, or to prevent the water in such mine from flowing in or upon neighboring mines, thereby imposing upon them an unjust burden.

"Section 4048. If any owners, lessees or occupants of any such mine shall fail or neglect to provide for the drainage thereof, and by reason of such failure or neglect, the owners, lessees or occupants of any adjacent or contiguous mine are compelled to pump or drain or otherwise provide for the water flowing in from such first mentioned mine, then, and in such event the owner, lessees or occupants of the mine so in default, shall pay, respectively, to those performing the work of drainage their proportion of the actual and necessary cost and expense of pumping, draining or otherwise providing for said water, and if they fail or refuse to make such payment, the same may be recovered by an action in any court of competent jurisdiction."

"Section 4051. When an action is commenced, as provided herein, to recover the costs and expenses for draining a lode or mine, it shall be lawful for the plaintiff to apply to the court for an order to inspect and examine the lodes or mines claimed to have been drained by the plaintiff, and upon affidavit that such inspection or examination is necessary for a proper preparation of the case for trial, the court shall grant an order for the underground inspection and examination of the lode or mine described in the petition. Such order shall designate the number of persons, not exceeding three, besides the plaintiff or his representative, who may examine and inspect such lode and mines, and take measurements for the purpose of showing the amount of water taken from the lode or mine or the number of fathoms of ground mined and worked out of the lode or mines claimed to have been drained, the cost of such examination and inspection to be borne by the party applying therefor. The court shall have power to cause the removal of any rock, debris, or any other obstacle in any lode or vein when such removal is shown to be necessary to a just determination of the question involved: provided, that no such order for inspection and examination shall be made except upon notice of at least three days, nor unless it appears that the

plaintiff has been refused the privilege of making the examination by the defendant, his or their agent."

E. F. McClennen, for the plaintiff.

B. E. Eames, for the defendant.

RUGG, C. J. These are actions at law with counts in contract and in tort. In each case the defendant filed a demurrer and also an answer in abatement. In the Superior Court the demurrers were sustained and the answers in abatement adjudged good and the actions were dismissed for want of jurisdiction.

The plaintiff and the defendant each is a corporation organized under the laws of Maine, conducting mining operations in Arizona and having a usual place of business in this Commonwealth.

THE ORE ACTION.

The declaration in the ore action so called alleges that the plaintiff is the owner in fee simple in possession of mining properties in Arizona, its title being derived from patents from the United States issued under mining laws whereby the plaintiff acquired the right to and took and has ever retained possession of all mineral veins, lodes and ledges throughout their entire depth, the top or apex of which lie inside of the surface lines of said claims extended downward although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations; that the defendant has been in possession of a certain mining shaft whereby it has taken and converted to its own use large amounts of ore from veins, lodes and ledges which had their respective tops or apexes upon mining claims owned by the plaintiff and wholly within the plaintiff's surface lines and in the actual possession of the plaintiff, and has sold and received large sums of money therefor. The declaration, while asserting a title to land in Arizona, is drawn for conversion of the ore as personal property and for money had and received from the sale of the same as personal property, and expressly excludes claim for damage to the realty in Arizona.

The answer in abatement avers that the defendant has not taken any ores claimed by the plaintiff except ores extracted from real estate in Arizona to which the defendant in good faith has at all times openly and to the knowledge of the plaintiff claimed

and now claims title and ownership under the laws applicable thereto, and that such ores have been extracted from veins, lodes and ledges underneath the surface of lands and claims owned by the defendant and within surface boundaries thereof projected vertically downward, and that the defendant has been at all times in actual possession of the entire surface and of the mining operations underneath the same to the complete exclusion of the plaintiff, and that its extraction of such ores has been open, to the knowledge of the plaintiff and under claim of title made in good faith. The answer in abatement must be accepted as true upon this record.

Both the plaintiff and the defendant being non-residents of this Commonwealth, considerations which might be pertinent in actions between our own citizens are laid on one side.

The allegations of the declaration appear to be sufficient under general principles of mining law to show title in the plaintiff to the veins or lodes from which the defendant is alleged to have taken ore. The ownership and possession of a vein of ore at the surface of the ground carries with it the ownership and possession of the vein throughout its entire depth although so far departing from a perpendicular as to extend outside the vertical side lines of such surface locations. *Empire State-Idaho Mining & Developing Co.* v. *Bunker Hill & Sullivan Mining & Concentrating Co.* 58 C. C. A. 311, 315; 121 Fed. Rep. 973, 977. *Last Chance Mining Co.* v. *Bunker Hill & Sullivan Mining & Concentrating Co.* 66 C. C. A. 299, 303; 131 Fed. Rep. 579. U. S. Rev. Sts. § 2322. These allegations of the declaration, so far as they concern matters of fact, cannot be treated as admitted for the purposes of this decision in view of the defendant's answer in abatement. That answer in effect avers possession and a *bona fide* claim of title by the defendant. It asserts possession and title directly adverse to the like claims by the plaintiff. At the lowest its averments are sufficient to show possession of that portion of the vein which has been actually worked by the defendant and from which the ore sued for has been extracted. *Hunnicutt* v. *Peyton*, 102 U. S. 333, 368. *Montana Mining Co. Ltd.* v. *St. Louis Mining & Milling Co.* 204 U. S. 204, 216–218. It would be too narrow a construction of the answer in abatement to interpret it as not a denial and therefore an admission of the plaintiff's title

to the ore and to the veins from which it came and the plaintiff's actual possession thereof.

It seems to be settled in mining law that title and possession of the surface of land *prima facie* carries ownership and possession of all beneath the surface, and that such persumption as to minerals may be overthrown by proof that such mineral is a part of a vein apexing in land or claim belonging to some one else. But that is matter of defence. *Lawson* v. *United States Mining Co.* 207 U. S. 1, 8. See *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529; *Del Monte Mining & Milling Co.* v. *Last Chance Mining & Milling Co.* 171 U. S. 55.

The record presents a cause arising out of a *bona fide* adversary dispute as to the title to real estate where the primary question involved is the title. That is the gravamen of the action. The plaintiff on the one side and the defendant on the other each asserts title to real estate. The settlement of that dispute will determine the title to the ore. The only way in which title to the ore can be decided is by settling the dispute as to the title to the land. The action in its essential feature concerns title to real estate and that alone. The title to the personal property is incidental to that main factor and will follow necessarily from the adjudication of the land title. Where the defendant is in adverse possession of the realty under a *bona fide* claim of title, authorities hold that the thing severed becomes his property, so that the owner of the land cannot maintain trover therefor but must resort to his remedy for possession. *Lehigh Zinc & Iron Co.* v. *New Jersey Zinc & Iron Co.* 26 Vroom, 350, 357. *Bigelow* v. *Jones*, 10 Pick. 161. *Duppa* v. *Mayo*, 1 Saund. 285. See R. L. c. 179, § 12.

The owner of land may waive the trespass and, affirming the conversion, sue, in an action for money had and received, one who severs wood, gravel or other parts of the realty from his land and transforms it into money. *Jones* v. *Hoar*, 5 Pick. 285, 290. *Gilmore* v. *Wilbur*, 12 Pick. 120. *Riley* v. *Boston Water Power Co.* 11 Cush. 11. *Phillips* v. *Bowers*, 7 Gray, 21. *Anderson* v. *Todesca*, 214 Mass. 102. It has been decided, however, that he can do this only when the title to the land is not in dispute between the parties. Where there is honest controversy whether the plaintiff or the defendant is owner of the title, or

where the owner has been disseised, then an action for money had and received cannot be maintained for severed wood or other realty. *Miller* v. *Miller*, 7 Pick. 133, 136. *Bigelow* v. *Jones*, 10 Pick. 161. *Brigham* v. *Winchester*, 6 Met. 460. These cases were cited with approval in *Pickman* v. *Trinity Church*, 123 Mass. 1. It there was said at pages 5 and 6 that "The law is indeed well settled that such title [that is, the title to real estate] cannot be tried in an action for money had and received." That rule "does not prevent an action for money had and received in many cases which require an investigation of title. . . . The reasons upon which the rule is founded apply only when the parties to the suit claim the land by adverse titles." This last statement is precisely applicable to the facts here disclosed. In *Boston* v. *Binney*, 11 Pick. 1, 9, are found these words: "It is said that a party injured may waive the tort and maintain assumpsit. But the defendant has a right to say to the plaintiffs, 'there has been no tort; you have nothing to waive; the land is mine, not yours.'" This is in substance the contention of the present defendant according to its answer in abatement. The case at bar appears on this record to be one where the parties as between themselves are at issue concerning adversary titles to the same land. The decision of that issue will put an end to their controversy.

There is nothing discordant with these views in *Parks* v. *Loomis*, 6 Gray, 467, where the defendant did not claim title to the land, and as between the parties to that action the title to the land was "collateral and incidental." The same is true of *Schulenberg* v. *Harriman*, 21 Wall. 44. In *Rogers* v. *Woodbury*, 15 Pick. 156, the issues made by the pleadings did not involve title to land.

Some cases seemingly assume that it is merely a question of pleading and that, if the cause of action is technically stated in trover or conversion and does not include an averment of injury to realty as a cause of action, then the action is transitory in its nature. *United States* v. *Ute Coal & Coke Co.* 85 C. C. A. 302; 158 Fed. Rep. 20. *Montana Mining Co. Ltd.* v. *St. Louis Mining & Milling Co. of Montana*, 105 C. C. A. 343; 183 Fed. Rep. 51. The difficulty, however, is more fundamental than one of pleading. Here, as in most cases, the court must look through form to substance. The inquiry is whether in its essence the real and decisive point at issue between the parties is a genuine controversy

as to the title to land, touching which their respective contentions are directly adversary. If the cause of action is in truth based upon such a controversy, then it is not a transitory action.

The distinction between local and transitory actions is not fanciful nor technical. It is founded on a keen sense of justice. An action at law involving essential characteristics of land ordinarily can be tried with a stronger likelihood of ascertaining the truth and doing right between the parties in a jurisdiction where the land is situated than in a foreign State. In the vicinity the nature of the land can be understood, the evidence bearing upon its title be presented conveniently, its properties and adaptability for valuable use comprehended, the elements of damage to it ascertained, its essential features recognized, and their accurate worth established in every and in all respects much better than at a distance. See *British South Africa Co.* v. *Companhia De Mocambique*, [1893] A. C. 602. The ground is especially firm, when the fundamental issue relates to such complicated real estate law as that pertaining to mines, for holding that an action will not be entertained by a court of a jurisdiction other than that where land lies. While the reasons, according to which a real action is held to be local rather than transitory, are largely historical, *Allin* v. *Connecticut River Lumber Co.* 150 Mass. 560, there is a strong practical sense for that rule as applied to claims concerning the title to mines. It was said, respecting a claim similar in its ultimate aspects to that here urged, in *Ophir Silver Mining Co.* v. *Superior Court of San Francisco*, 147 Cal. 467, at page 478, that "The trial of the questions necessarily arising in such a case would call for the testimony not only of scientific experts but of many practical experts (miners) who had examined the ground and been through all the tunnels, drifts, etc., by means of which the alleged identity of the croppings in one claim and the ore found in the other could be supported or disproved. A somewhat extensive and varied experience in the trial of such issues in the mining litigation of Nevada convinces me that the practical inconvenience in the way of delay and expense in trying the title to Nevada mines in the State of California would be intolerable to the litigants and equally so to the courts. And the same doctrine which would compel a Nevada miner to litigate the title to his mine in the courts of California would compel the

owner of a California mine to defend his title in the courts of Maine or Florida." These words of Chief Justice Beatty gain weight from his unique distinction of having been Chief Justice of Nevada for a considerable period before holding the same office in California, States where mines are not uncommon.

Other difficulties in assuming jurisdiction of a case of this sort are set forth at length in the opinion in the earlier suit between these parties reported in 233 Mass. 522, and need not be repeated here.

We do not regard the recent decision of the Supreme Judicial Court of Maine, 119 Maine, 213, between the same parties, as essentially at variance with the conclusion here reached, for the reason that the parties are both citizens of that State, which is one of the grounds inducing that court to assume jurisdiction of a cause of action apparently the same as that here alleged.

The principle prevails generally that transitory actions will not be entertained to recover money damages as for the conversion of personal property where the dispute at bottom is one concerning the title to land, but that under such circumstances the parties will be relegated to courts vested with jurisdiction to try the title to the land as a local action. *Downs* v. *Finnegan*, 58 Minn. 112. *Parks* v. *Morris, Layfield & Co.* 63 W. Va. 51, 56, 57. *Brown* v. *Caldwell*, 10 S. & R. 114, 115. *Thomas* v. *Hukill*, 131 Penn. St. 298, 303. *Lindsley* v. *Union Silver Star Mining Co.* 26 Wash. 301. *Mullins Lumber Co.* v. *Williamson & Brown Land & Lumber Co.* 167 C. C. A. 21; 255 Fed. Rep. 645, 647. *Peyton* v. *Desmond*, 63 C. C. A. 651; 129 Fed. Rep. 1. It was assumed in *Tyson* v. *McGuineas*, 25 Wis. 656, 661, that, if the defendant in an action for converting lumber by cutting trees on the land of the plaintiff raised a genuine question as to the title of the land, the action would be local and not transitory. Different considerations might arise if it was apparent that the controversy as to title was feigned and not well founded. *Moret* v. *Mason*, 106 Mich. 340. We are not able to find anything essentially at variance with this conclusion in *Stone* v. *United States*, 167 U. S. 178. It is plain that in that case the defendant did not set up a title to land adverse to that of the plaintiff and that there was no genuine controversy concerning ownership of the land by the United States.

In view of the ground upon which this decision rests, the allegation in the declaration, to the effect that the plaintiff has for its complaints no adequate remedy outside of Massachusetts, cannot be regarded as of decisive significance. It must be assumed that there are courts in Arizona competent to establish the plaintiff's rights to real estate located there. There is an averment to that effect in the answer in abatement.

All these considerations lead to the conclusion that the plea in abatement rightly was adjudged sufficient and that the action should be dismissed.

We are of opinion that this result violates no constitutional right of the plaintiff. It has not been denied the equal protection of the laws secured by art. 14 of the Amendments to the Federal Constitution. Equal protection of the laws in its constitutional sense implies that all litigants similarly situated may appeal to the courts both for relief and for defence under like conditions and with like protection and without discrimination. *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 153. *Barbier* v. *Connolly*, 113 U. S. 27, 31. *Chicago, Milwaukee & St. Paul Railway* v. *Polt*, 232 U. S. 165. *Atchison, Topeka & Santa Fe Railway* v. *Vosburg*, 238 U. S. 56. *Duane* v. *Merchants Legal Stamp Co.* 231 Mass. 113, 127, 128. In the decision of this case principles of general law have been followed and applied. No discriminatory rule has been invoked not bearing equally upon every litigant similarly situated.

The plaintiff has been denied no right established by art. 4, § 2 of the Constitution of the United States, which affords citizens of each State all the privileges and immunities of citizens in the several States. "A corporation is not a citizen within the meaning of the constitutional provision that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'" *Blake* v. *McClung*, 172 U. S. 239, 259. *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112, 126. But here again the contentions of the plaintiff have been considered and decided on principles of general law.

The case is rightly before us on exceptions.

Exceptions overruled.
Appeal dismissed.

THE WATER ACTION

The declaration in this action is to recover a debt for money expended in this Commonwealth for the defendant's proportion of expense for pumping water from the defendant's mine in Arizona. The action is founded upon §§ 4047, 4048 of the Rev. Sts. of the State of Arizona 1913, which are printed on pages 186, 187. In this case also the defendant demurred and filed an answer in abatement. That answer set forth other sections of the statutes of Arizona as pertinent, among which is § 4051, printed on pages 187, 188. In this case, also, the demurrer was sustained, the answer in abatement adjudged sufficient and the action dismissed.

These sections of the statutes upon which the plaintiff's action is grounded deal with matters in their nature essentially local to Arizona.

The statute itself bears strong implication that it was intended to create a right enforceable by action only in the courts of Arizona. The inspection afforded to the plaintiff by § 4051 manifestly can be enjoined with compelling power only by a court in Arizona. That provision can have no power outside its territory.

It is manifest that title to the several mines is involved in the settlement of the issues raised in this action. The reasons already discussed in the decision of the ore action are to a large extent equally applicable to this action.

The determination of the common ingress of water and subterranean water communications well may necessitate ascertainment with minute exactness of physical features of land both on and underneath the face of the earth and may require examination of surface and subterranean watercourses and channels and other geological aspects of surrounding country as well as of the properties of the parties directly concerned in the litigation. These are questions naturally to be determined by the court of Arizona.

There is a strong analogy between a case like the present and actions for damage by flowage or diversion of water which commonly have been counted local either to the jurisdiction where the damage is done or that where the obstruction is erected. *Barden* v. *Crocker*, 10 Pick. 383. *Mannville Co.* v. *Worcester*, 138 Mass. 89. Moreover, there are present here in addition factors

enumerated in *National Telephone Manuf. Co.* v. *DuBois*, 165 Mass. 117, and affirmed in the earlier suit between these parties, 233 Mass. 522, as independent reasons for declining to assume equity jurisdiction of a controversy between non-residents, namely, a doubt whether complete justice between the parties can be done here, the imposition upon the defendant of large expense and great difficulties in conducting the investigation in our courts, most of which would be avoided by bringing the action in the forum where the cause arose.

This conclusion is not at variance with cases like *Stone* v. *Old Colony Street Railway*, 212 Mass. 459, 464, 465, *Nashua River Paper Co.* v. *Hammermill Paper Co.* 223 Mass. 8, and *Hanlon* v. *Frederick Leyland & Co. Ltd.* 223 Mass. 438, where the disposition of this court to assume jurisdiction of causes of action wherever practicable has been plainly manifested. It seems to us that cases like *Atchison, Topeka & Santa Fe Railway* v. *Sowers*, 213 U. S. 55, 70, and *Tennessee Coal, Iron & Railroad Co.* v. *George*, 233 U. S. 354, which deal with actions confessedly transitory, are not pertinent to the present issue.

These considerations lead to the conclusion that the statute upon which this action is founded does not authorize a suit in this Commonwealth and that the decision of the Superior Court was right in adjudging the answer in abatement sufficient and in dismissing the action.

Exceptions overruled.
Appeal dismissed.

ARTHUR FINKOVITCH *vs.* SADYE F. CLINE.

Suffolk. May 17, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, To enjoin ejectment of tenant by landlord, "He who seeks equity must do equity." *Landlord and Tenant*, Ejectment for breach of covenant. *Equity Pleading and Practice*, Decree.

The lessee of the second floor apartment of a two-family dwelling house on a street in a residential section of a city, upon which all the other houses were single-family dwellings costing from $10,000 to $20,000, cannot maintain a suit in equity to restrain the lessor, who occupied the first floor of the house, from

ejecting him for breach of a covenant in the lease not to "make or suffer any unlawful, improper, noisy or otherwise offensive use" of the premises, where it appears that, upon the back piazza of the plaintiff's apartment, provision had been made for the placing of a clothes reel, that the plaintiff would not purchase a reel and that, against the expressed wish of the defendant, the plaintiff's wife persistently for months hung clothes for drying upon lines stretched upon a piazza over the front entrance to the house in full view of the neighborhood, which use of the premises a judge who heard the suit found to be a breach of the covenant which was wilful, irritating and in part at least was with intent to displease the defendant.

The judge who heard the suit above described being of opinion that the consequences of a forfeiture would be a "very severe penalty for the fault; for the lease is valuable, especially at this moment," ordered a decree restraining the defendant upon payment by the plaintiff of overdue rent and taxable costs from proceeding to eject the plaintiff for breach of covenant so long as the plaintiff refrained from using the piazza for drying or hanging out articles thereon. The defendant insisted upon her right of forfeiture. *Held*, that the defendant was entitled to have the suit dismissed with costs since equity will not afford its shield against the natural consequences of contumaciously wrongful conduct.

BILL IN EQUITY, filed in the Superior Court on August 9, 1919, by the lessee under a lease in writing of the second floor apartment of a two-family dwelling house on Howland Street in that part of Boston known as Roxbury against the lessor, who occupied the first floor apartment, to enjoin eviction.

In the Superior Court the suit was heard by *Wait*, J. Material facts found and the decree ordered by the judge are described in the opinion. The judge reported the case for determination by this court, stating in the report: "Upon the foregoing findings, the defendant contends that he is entitled to a decree dismissing the bill; but I am of the opinion that 'the consequence of a forfeiture is a very severe penalty for the fault; for the lease is valuable, especially at this moment' and that if 'equity can frame a less burdensome decree,' in accordance with equity jurisprudence and practice, a decree should issue 'restraining the defendant from proceeding to eject the plaintiff for this, so long as the plaintiff refrains from using the piazza for drying or hanging out articles thereon,' upon payment to the defendant by the plaintiff of the rent due to date of the decree and taxable costs. It is agreed by the defendant that if, upon the foregoing findings, such a decree can issue, in accordance with equity jurisprudence and practice and with sound discretion, it may be entered; and I report the case for the determination of the Supreme Judicial Court, it

being expressly stipulated that, pending determination of the case on this report and upon the continued payment by the plaintiff of the rent, which the defendant receives without prejudice or waiver, the plaintiff shall not be molested in his possession."

E. Greenhood & F. Freundlich, for the defendant, submitted a brief.

H. A. Mintz, for the plaintiff, submitted the case without brief or argument.

RUGG, C. J. This is a suit in equity whereby the plaintiff, tenant of the defendant under a written lease for a term of three years, seeks to restrain the defendant from evicting him. The answer admits the lease and sets up entry and termination of the lease for breach of condition. At the trial it appeared that, before the filing of the bill, the defendant entered for breach of covenant, forfeited the lease, and notified the plaintiff to quit. The judge took a view of the premises and upon all the evidence made the general findings that the plaintiff fails to prove his right to restrain a forfeiture, that he has broken the covenant not to "make or suffer any unlawful, improper, noisy or otherwise offensive use" of the premises, and that his default is wilful, irritating, and with intent in part at least to displease the defendant.

The house was in a residential section, "the street being fully improved on both sides with modern houses costing, with land, from $10,000 to $20,000, this house being the only one not a single-family dwelling house. The house has a front piazza on the first floor, running along the entire front of the house, and sets back about fifteen feet from the street, and the roof of the piazza constitutes the floor of a balcony for the upper apartment. This balcony has no roof, but is enclosed on three sides by a two and one half foot outside railing. The alleged breach is in the plaintiff's persistent use, in the daytime, of the front balcony, beginning months before said forfeiture and continuing up to the trial, by hanging clothes thereon for drying, upon lines stretched from the post of a piazza hammock to the front blinds or balcony railing, or both, in full view of passers-by, against the defendant's desire and protest. At the back of the house on each floor, behind the kitchen, there is a back piazza, to the outside of which, on the lower floor, the defendant has conveniently attached a portable

clothes reel on which his family hangs clothes for drying, and the same thing could have been done by the plaintiff on his floor. The defendant has furnished the plaintiff with no such reel, nor erected any reel or other conveniences for hanging clothes on the lot in the rear of the house. . . . The plaintiff's wife, with his assent, has from time to time, used the front piazza of their apartment to hang clothes upon for drying, and such use has been offensive to the defendant and to the neighborhood. She has done this because she has no convenient place for the hanging of her wash in any other place. She sent many articles to the laundries; but she and the plaintiff have been unwilling to incur the expense, slight though it is, to place a reel for drying clothing, etc. at the back of the house where one might be placed." These specific findings of fact under the circumstances warranted the general finding of breach of the covenant by the plaintiff.

The ruling of law that the lease does not make it the duty of the landlord to supply a clothes reel was right. The lease imposes no obligation of that kind.

Having made the findings of fact and ruling of law, the judge, being of opinion that the consequences of a forfeiture is a "very severe penalty for the fault; for the lease is valuable, especially at this moment," ordered a decree restraining the defendant from proceeding to eject the plaintiff for breach of covenant so long as the plaintiff refrains from using the piazza for drying or hanging out articles thereon, upon payment of overdue rent and taxable costs. The defendant insisted upon her right of forfeiture. The question is whether such a decree could be entered in accordance with equity jurisprudence and practice.

Equity grants relief to tenants against forfeiture for breach of a covenant to pay rent even though the failure to pay is wilful on the part of the lessee. That is for the reason that the right of forfeiture is given to the landlord as security for the payment of the rent and on the rent being paid with interest "the very thing is done for which the security was given." *Gordon* v. *Richardson*, 185 Mass. 492. Equity also relieves against a forfeiture where there has been a breach of a covenant, caused by accident or mistake, to perform some collateral duty such as to repair or insure, and where the lessor by compensation or otherwise can be placed in the same position as if the breach had not occurred.

Mactier v. *Osborn*, 146 Mass. 399. Doubtless relief will be granted in other instances where the lessee is innocent of real fault or the breach has been induced by conduct, words or unjustifiable silence on the part of the landlord, or where there are other elements which render compliance with the terms of the lease offensive to a court of conscience.

In the case at bar such circumstances are absent. The acts of the plaintiff in breach of the covenant could not fail to have an immediate effect upon the character of the neighborhood. Those acts were wilful, ostentatiously public, and against the protest of the landlord. They were of a nature calculated to exasperate and provoke the other party to the contract and to promote corrosive influences in the community. They were dictated by motives which do not commend themselves to a court of equity. A fundamental maxim of equity is that one seeking its protection must come into court with clean hands with reference to the particular matter in issue. The plaintiff fails in compliance with that maxim, and has directly violated it. According to the terms of the contract the lease has been broken. The defendant is merely asserting her legal rights. The plaintiff is asking the court to guard him against the legal consequences of his own wilful act committed in conscious violation of his agreement. Equity does not afford its shield against the natural consequences of contumaciously wrongful conduct. The circumstances do not warrant the interposition of that extraordinary relief. *Darvirris* v. *Boston Safe Deposit & Trust Co.* 235 Mass. 76.

On the facts found the bill should be dismissed with costs.

So ordered.

HOWARD M. BISCOE *vs.* TAX COMMISSIONER.
ARTHUR W. BLACKMAN *vs.* SAME.

Suffolk. May 17, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Tax, On income, Exemption.

Income received from the United States as salary by one, who, before the proclamation by the President of the United States on December 26, 1917, assuming control of all transportation systems, was a vice-president in charge of the operation of a railroad corporation and thereafter continued in charge of the operation with duties practically the same as before, is by St. 1916, c. 269, § 5 (b), exempted from taxation as income under the provisions of that statute.

The exemption from taxation upon income under St. 1916, c. 269, § 12, provided by § 5 (b), for the "wages and salaries of employees and officers of the United States government," applies to income received from the United States as salary by one, who, before the federal government assumed control of the transportation system as above described, was employed as assistant counsel of a railroad corporation in Massachusetts and who thereafter continued to hold that position under the management by the federal government with practically no change of duties.

PETITIONS, filed in the Superior Court respectively on November 23 and on November 28, 1919, under St. 1916, c. 269, § 20, appealing from the refusal of the Tax Commissioner to abate income taxes alleged by the petitioners to have been assessed upon salaries received by them from the United States as officers and employees of the federal government in violation of § 5 (b) of the statute.

In the Superior Court the petitions were heard together by *Hammond*, J., upon an agreed statement of facts. Material facts are described in the opinion. The judge reported the cases for determination by this court upon the pleadings and the agreed facts.

The cases were submitted on briefs.

G. H. Fernald, Jr., for the petitioners.

J. W. Allen, Attorney General, *L. Powers & E. H. Abbot, Jr.*, Assistant Attorneys General, for the respondent.

PIERCE, J. These are petitions under St. 1916, c. 269, § 20, for the abatement of income taxes assessed on the petitioners;

and by report from the Superior Court they are before this court upon the pleadings and agreed facts. In each case the answer admits that a tax was assessed upon the petitioner in the manner and of the amount set forth in the petition; that the petitioner duly applied for an abatement of the tax, and upon the denial of his application seasonably filed this petition.

St. 1916, c. 269, § 12, provides that "Every individual inhabitant of the Commonwealth . . . whose annual income from all sources exceeds two thousand dollars shall annually make a return of his entire income, except income derived . . . (f) from wages or salaries received from the United States." St. 1916, c. 269, § 5 (b), provides that "The wages and salaries of employees and officers of the United States government shall not be taxed."

On December 28, 1917, the petitioner Biscoe was vice-president of the New York Central Railroad Company in charge of the operation of the Boston and Albany Railroad. The President of the United States, by proclamation dated December 26, 1917, took possession and assumed control on December 28, 1917, through the Secretary of War, of all transportation systems as defined in said proclamation. These systems included the railroad corporations by whom the petitioners were employed. Biscoe continued in charge of operation as vice-president until he was appointed federal manager of the Boston and Albany Railroad by the regional director on June 10, 1918. His salary and, "as a practical matter," his duties remained the same. He was required to sever his official relation "with the particular Companies and to become the exclusive representative of the United States Railroad Administration."

On December 28, 1917, the petitioner Blackman was assistant counsel in Massachusetts of the New York, New Haven, and Hartford Railroad Company. After the proclamation of the President of the United States he continued to hold his position under the title of assistant counsel until the autumn of 1918, when the title of his office, without change of duties, was changed to assistant solicitor.

During the entire year of 1918 both petitioners "received . . . instructions solely, either directly or indirectly, from the Director General of Railroads through the latter's representatives." The

salaries of the petitioners during the entire year of 1918 were paid out of funds from the following sources: money taken over by the United States on December 28, 1917; money earned thereafter by the railroads under federal control; and money received from the treasury of the United States. The question presented is whether the salaries of these petitioners received from the United States during the year 1918 are "wages and salaries of employees and officers of the United States government."

The property of the railroads by the proclamation passed into the possession, control and operation of the Director General on December 28, 1917, for the purposes and to the limit set forth, and at the same time necessarily passed from the railroad to the United States to a like degree. *Northern Pacific Railway* v. *North Dakota*, 250 U. S. 135, 144. *Public Service Commissioners* v. *New England Telephone & Telegraph Co.* 232 Mass. 465, 470. During the entire year of 1918 each petitioner received his salary from the moneys of the United States. Whether the money paid out at the order of the United States was paid before or after it had been covered into the treasury of the United States is a matter of indifference to the determination of any question now at issue. During the entire year of 1918 each petitioner received his instructions from the United States government solely through the Director General of Railroads through his representatives. It would seem to be plain that any relation of employee that existed between these petitioners and the railroad on December 28, 1917, ceased to exist when the control of the railroads passed to the United States government, and that a new relation began with the consent of the petitioners and continued to exist during the year 1918 between the petitioners and the United States government, represented by the Director General.

We do not agree with the contention of the respondent that the exemption of a federal salary extends only to the extent that "If the federal salary exceed two thousand dollars, the federal official can claim no specific deduction in addition to the exemption; if his federal salary be less than two thousand dollars he may claim as a deduction only the difference between the two thousand and his federal salary." The federal salary is exempt under St. 1916, c. 269, § 5 (b); and without such statute would be exempt for the reasons expressed in *Dobbins* v. *Commissioners of*

Erie County, 16 Pet. 435, 450, and in *Collector* v. *Day*, 11 Wall. 113. *Evans* v. *Gore*, 253 U. S. 245.

We discover no substantial distinction in the facts to differentiate the relation and legal right of Blackman from that of Biscoe.

It follows that an abatement of the entire tax assessed should be made upon each petition, and that the amount thereof shall be repaid to the petitioners by the Treasurer and Receiver General, with interest at the rate of six per cent per annum from the time when the tax was paid, and costs.

So ordered.

ANDREA GRITTA'S (dependents') CASE.

Suffolk. May 17, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Dependency. *Parent and Child. Illegitimacy. Words*, "Dependents," "Family."

A woman married in Italy, after her husband had been committed to prison there for life, came to the United States and, in good faith believing that there was no impediment to her marrying a second time, went through a marriage ceremony with a man by whom she afterwards had children. Thereafter the putative father, the children and their mother lived together as one family and were supported by him until his death while in the employ of a subscriber under the workmen's compensation act. Upon claims by the children for compensation under the act, it was *held*, that, although, being illegitimate, the children would not come within the description of "children" contained in St. 1911, c. 751, Part II, § 7 (*c*), as amended by Sts. 1914, c. 708, § 3 (*c*); 1919, c. 204, they might be found to be members of the employee's family wholly dependent upon his earnings for support at the time of his death, and therefore to be dependents under the definition in St. 1911, c. 751, Part V, § 2, and to be entitled to compensation under Part II, § 7 of the act.

CERTIFICATION to the Superior Court under the workmen's compensation act of a decision of the Industrial Accident Board upon claims by Frances and Andrea, minor illegitimate children of Andrea Gritta. a deceased employee, for compensation under the act.

The board by its decision denied requests by the insurer for the following rulings:

"2. On all the evidence, Frances and Andrea Pappalardo, otherwise known as Frances and Andrea Gritta, are not entitled to compensation.

"3. On all the evidence, Frances and Andrea Pappalardo, otherwise known as Frances and Andrea Gritta, were not members of the deceased employee's family."

The board also by its decision affirmed and adopted findings and rulings of a single member of the board, who had heard the case, in substance that the children were members of the family of the deceased employee and were wholly dependent upon him for support; and ruled that they were "entitled to compensation as total dependents at the rate of $10 per week for a period of four hundred weeks . . . unless sooner terminated under the workmen's compensation act."

Other material findings and rulings of the single member of the board, which were adopted by the board, are described in the opinion.

In the Superior Court by order of *Lawton*, J., a decree was entered directing that compensation be paid in accordance with the decision of the Industrial Accident Board. The insurer appealed.

The case was submitted on briefs.

J. F. Scannell, for the insurer.

A. D. Epstein, for the claimants.

CROSBY, J. The record shows that Maria Pappalardo was married in Italy and lived there with her husband; that, before she left that country in 1911, her husband had been convicted of serious offences and committed to prison for life; that his wife then came to America, met the deceased employee, and later, about September 26, 1913, "went through a marriage ceremony, legal in form," with him; and that thereafter the parties lived together as husband and wife.

The single member of the Industrial Accident Board found that in entering into the alleged marriage contract she did so with the belief there was no legal obstacle to it and that "at no time was any question raised in her mind as to the legality of her marriage, until the present proceedings were begun;" that two children were born, and the parents and children lived together until the employee received an injury which resulted in his death; and further, that the children were totally dependent upon the deceased.

He also found that the mother is not entitled to compensation under the act; that finding, upon review, has been affirmed by the Industrial Accident Board without appeal. The board also affirmed the finding that the children did not come within the definition of "child or children" as those words are used in St. 1911, c. 751, Part II, § 7 (*c*), as amended by St. 1914, c. 708, § 3 (*c*), and St. 1919, c. 204. They must be held to refer only to a legitimate child or children. R. L. c. 133, § 3. *Baylis* v. *Baylis*, 207 N. Y. 446.

After defining the persons who are conclusively presumed to be wholly dependent for support upon a deceased employee, in Part II, § 7, it is further provided in the same section that "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury." Part V, § 2 defines dependents as follows: "'Dependents' shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury." In *Cowden's Case*, 225 Mass. 66, it was said at page 67: "'Family' in its usual sense means 'the collective body of persons who live in one house and under one head or management.' *Dodge* v. *Boston & Providence Railroad*, 154 Mass. 299, 301. That is the significance ordinarily attributed to the word under the act. *Kelley's Case*, 222 Mass. 538. See *Newman's Case*, 222 Mass. 563, 568." See cases cited 19 Cyc. 451, 452, 453. The board has found that the children were members of the employee's family; that finding is amply supported by the evidence. It would seem plain from the facts recited in the record, that these children from the date of their respective births lived with their mother and the employee until his death; that he supported them and they were a part of his family to the same extent as if their parents had been lawfully married. The deceased employee recognized the moral obligation which rested upon him to support the children and cared for them as his own lawful offspring, and manifestly they were in fact members of his family at the time of his death.

The question remains whether the illegitimacy of these children affects their status as members of the employee's family under the act. It is the contention of the insurer that, as the act

does not specifically include illegitimate children as entitled to its benefits, they should not be held to take by implication; and that in the interests of marital morality and sound public policy they should not be held to be members of the employee's family. Considerations of public policy which would prevent a wrongdoer from participating in the benefits of the act ought not to apply to innocent children born out of lawful matrimony; they are not responsible for their existence or status, they have committed no wrong, and they must be supported as the death of the employee has taken from them the care and maintenance which they had previously received from him as the head of the family. We are of opinion that upon the facts disclosed by the record they are entitled to compensation under the act.

Although the question has not previously been considered by this court, the conclusion reached is in harmony with that of courts in other jurisdictions where it has arisen under workmen's compensation acts containing provisions similar to our own in this respect. *Roberts* v. *Whaley*, 192 Mich. 133. *Scott's Case*, 117 Maine, 436. *Piccinim* v. *Connecticut Light & Power Co.* 93 Conn. 423.

The cases of *Bell* v. *Terry & Tench Co.* 177 App. Div. (N. Y.) 123; *S. C.* 163 N. Y. Supp. 733, *Scott* v. *Independent Ice Co.* 135 Md. 343, are not at variance with the conclusion here reached. The language of the workmen's compensation acts there construed is materially different from ours, and for that reason need not be considered.

It follows that the rulings two and three requested by the insurer, could not properly have been made.

Decree affirmed.

EUGENE AVERELL *vs.* CITY OF NEWBURYPORT.

Essex. June 7, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

School and School Committee. Contract, Performance and breach: condition precedent. *Corporation,* Officers and agents. *Waiver.*

By R. L. c. 42, § 29, the filing, by a teacher in a public school in a city with the auditor or treasurer of the city or with any officer who may be prescribed in its charter, of one copy of a certificate from the school committee of his qualifications is made a condition precedent to his right to demand and receive compensation for his services; and this requirement of the statute cannot be waived either by the mayor or by the city solicitor in an action by the teacher against the city for a balance of salary which had been withheld upon an order of the mayor for a reason other than a failure to file the certificate.

CONTRACT, by a teacher in the public schools of Newburyport, for a balance of salary alleged to be due to him and for balances of salary alleged to be due to eleven other teachers who had assigned their claims to him. Writ dated March 1, 1919.

In the Superior Court the action was heard by *O'Connell,* J., without a jury, upon an agreed statement of facts from which it appeared that, by reason of absences of the twelve teachers from duty during January, 1919, the auditor and the treasurer upon order of the mayor had deducted from their salaries as approved by the school committee the amounts sought to be recovered in this action.

The statement of agreed facts also contained the following: "None of the teachers named in the plaintiff's declaration had obtained and filed any certificate of qualification, as provided by R. L. c. 42, § 29; but for many years the city of Newburyport has paid its teachers without such certificate having been filed. If under the instructions of the mayor the city solicitor has authority to waive the defence of that statute, the court may treat the same as waived;" and it was stated in the bill of exceptions that, "in connection with the matter of the filing of certificates of qualification mentioned in the statement of agreed facts, the city solicitor stated that if he or the mayor had authority to waive the filing of the certificates they both desired to do so."

The judge found for the plaintiff for the full amounts claimed in the declaration; and the defendant alleged exceptions.

The case was submitted on briefs.

H. I. Bartlett, for the defendant.

E. Foss, for the plaintiff.

PIERCE, J. This action is to recover the balances, $264.42, claimed by twelve teachers of the public schools of the city of Newburyport to be due them for the month of January, 1919. These balances are the amounts deducted by the city auditor from the month of January payroll, as approved by the school committee, for the days each of these teachers was absent from his or her school during that month, the school committee having made no deduction for the absences of any of these teachers during that month. After payment was refused by the city treasurer, and before suit, eleven of these teachers assigned their claims in writing to the plaintiff, who is one of the twelve teachers above mentioned.

The action was heard in the Superior Court without a jury upon agreed facts not supplemented by any evidence or further facts, the city solicitor stating that he or the mayor desired to waive the filing of the certificate of qualification mentioned in the agreed facts if either of them had authority to do so. None of the teachers named in the plaintiff's declaration had obtained and filed any certificate of qualification, as provided by R. L. c. 42, § 29, which in terms reads: "Every teacher shall, before he opens any public school, obtain from the school committee a certificate in duplicate of his qualifications, one of which shall be deposited with the selectmen, or, in a city, with the auditor or treasurer or with any officer who may be prescribed in the charter, before any payment is made to him on account of his services, and upon so filing such certificate, he shall be entitled to receive, on demand, his wages due at the expiration of any quarter, or term longer or shorter than a quarter, or upon the close of any single term of service." The statute contemplates that a duly qualified teacher, under contract with the school committee, may render services as a teacher in the public schools before he shall receive from the school committee in duplicate a certificate of his qualifications, and recognizes that wages may be earned in such services, though they may not be presently payable, in the provision that one of

the certificates shall be deposited with the designated official before any payment is made to him on account of his services, "and upon so filing such certificate, he shall be entitled to receive, on demand, his wages due at the expiration of any quarter. . . ." *Libby* v. *Douglas*, 175 Mass. 128. Compare *Jewell* v. *Abington*, 2 Allen, 592.

It thus appears that the statute is directory as to the time of obtaining the certificate and as to the requirement that it shall be in duplicate, but is mandatory in its command that one of the certificates shall be deposited with a certain official "before any payment is made to him on account of his services" and before he shall be entitled to receive on demand his wages. The filing of the certificate being made by the express terms of the statute a condition precedent to the right of a teacher to demand and receive compensation for his services rendered, it follows that an action will not lie before such filing and it also follows that neither the defendant, its mayor nor city solicitor has authority expressly or impliedly to waive the performance of the duty of filing the certificate imposed by law on the several teachers.

Exceptions sustained.

JOHN T. SIMPSON *vs.* CITY OF MARLBOROUGH.

Middlesex. June 11, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Municipal Corporations, Officers and agents. *Notice. Architect. Marlborough. Words*, "Approved."

Officers of a city or of a town have only such powers to bind their municipality by contract as are conferred by the express provision of a statute or by necessary implications therefrom.

One having business relations with a city or a town is fixed with notice of the existence and of the scope of the authority of those professing to act as its agents.

The mere fact, that a city received benefit from services rendered to it by an architect, does not render the city liable to pay for such services if it appears that they were rendered at the request of, and under an agreement purporting to have been made in its behalf by, persons acting without authority conferred by express provisions of a statute or by necessary implication from such provisions.

Section 16 of the charter of the city of Marlborough, St. 1890, c. 320, providing, "The city council shall not authorize the erection of a school house or any addition thereto nor pass any appropriation for such purpose until plans of the same have been approved by vote of the school committee, and until such approval has been certified in writing to the council by the chairman of said committee," vests in the city council the authority and duty to authorize the erection of school houses subject to the limitation that no final action can be taken until the plans have been approved by the school committee and the city council has been notified thereof in such a manner that it may be made a matter of final record.

By the provision of the charter of the city of Marlborough, above quoted, the school committee is given no authority either expressly or by implication to employ an architect to prepare plans and specifications for the erection of a school house.

CONTRACT for compensation for services as an architect alleged to have been rendered by the plaintiff to the defendant at the request and under agreement with duly authorized agents of the defendant, the declaration containing three counts, of which the third was upon an account annexed. Writ dated November 29, 1915.

In the Superior Court the action was heard by *Aiken*, C. J., without a jury. Material evidence is described in the opinion. At the close of the evidence the defendant asked for the following rulings:

"1. On all the evidence, a verdict should be ordered for the defendant.

"2. Under St. 1890, c. 320, § 16, the school committee cannot bind the city by an oral agreement made with the plaintiff.

"3. The school committee was not invested with any authority to spend money, either by general law, statute or by any authority given to it by the city; therefore, in its selection of the plaintiff as architect, it exceeded its powers and the city is not liable.

"4. The plaintiff himself is chargeable with certain knowledge of the powers conferred upon the school committee by law, and it was his duty to investigate these powers before entering into any contract with the city.

"5. No action will lie against a city or town for the act of a public officer or board, though inuring to its advantage, unless the right of action has been given by statute.

"6. A city or town is a governmental subdivision,—it possesses only the powers conferred upon it by law. Restrictions expressed by its vote, therefore are to be treated as strict limitation upon

the powers of its officers and agents. In this case, the mode of contracting is expressed by the city charter and the vote or order of July 12, 1915, is conclusive and the plaintiff is bound by this limitation."

The Chief Justice granted the fifth request and refused the others, making, among other rulings and findings, the following:

"The city charter directs that plans of a school house shall be approved by vote of the school committee and the approval certified in writing to the council by the chairman of the committee.

"At the request of the school committee the plaintiff prepared plans which the school committee by vote approved and the chairman of the committee certified the approval to the council in writing by filing in the city clerk's office a copy of the vote of the committee.

"In my opinion, the requirement of approval of plans imports the right to procure plans and to bind the credit of the city for the reasonable cost of the plans.

"The plaintiff acted in good faith. He furnished to the committee plans and accompanying specifications sufficient in detail for determining the processes and cost of construction.

"I find the reasonable charge for the work is $1,131.90."

There was a finding for the plaintiff in the sum of $1,401.48, and the defendant alleged exceptions.

The case was submitted on briefs.

R. H. Beaudreau, for the defendant.

E. H. Vaughan, E. T. Esty & J. Clark, Jr., for the plaintiff.

RUGG, C. J. This is an action of contract to recover compensation for services rendered by the plaintiff in preparing plans and specifications for a school house, the erection of which in the defendant city was contemplated in 1915. The city council on June 7, 1915, passed an order for the appointment of a committee consisting of three members of the school committee, the mayor, two aldermen and three members of the common council, "invested with full authority to make contracts, purchase supplies and fittings and superintend the erection of a new school house" with "power to do any and all things necessary for the construction and equipment of the building . . . according to plans approved by the school committee." Orders also were passed for a substantial loan and appropriation. Early in July

the school committee acting by itself issued invitations to architects to prepare sketches for the new building, selected the plaintiff as architect, and approved plans and specifications prepared by him in detail pursuant to such employment. Certificate of such approval was filed with the city clerk. The plaintiff never conferred with the construction committee appointed in accordance with the city council order of June 7.

The case hinges upon the question whether the defendant was bound by this action of the school committee, or whether their action was without authority of law. It is elementary in the law of cities and towns that their officers have only such powers to bind their municipalities by contract as are conferred by the express terms or necessary implications of statutes. They have no inherent powers of this nature. It follows from this principle that persons having business relations with cities and towns are bound to take notice of the scope of the authority of those professing to act as agents, for the reason that the matter, being controlled by public law, is equally open to the knowledge of all. Benefit to the city or town is irrelevant in this connection. *Boston Electric Co.* v. *Cambridge*, 163 Mass. 64. *Higginson* v. *Fall River*, 226 Mass. 423.

Under the general law the power and duty of erecting school buildings is vested in the cities and towns and not in the school committees. R. L. c. 42, § 49. While under certain circumstances, when a city or town refuses to provide sufficient accommodations for the conduct of the schools required by law, the school committee may exercise somewhat extensive and drastic powers, the case at bar does not come within that principle because the city council, so far as is shown by this record, acted seasonably and adequately toward the erection of the school house.

It is provided by the charter of the defendant, St. 1890, c. 320, § 16, that "The city council shall not authorize the erection of a school house or any addition thereto nor pass any appropriation for such purpose until plans of the same have been approved by vote of the school committee, and until such approval has been certified in writing to the council by the chairman of said committee." No other part of the charter of the defendant city, or of the general law, confers further power in this particular upon the school committee. The authority and duty to authorize the

erection of school houses and additions thereto through such committees or agents as it may determine is manifestly vested in the city council by these words of the charter. The general obligation and the main power rests with that body. There is, however, the limitation that no final action can be taken until the plans have been "approved" by the school committee and the city council notified thereof in such manner that it may be made matter of formal public record. That is the full sweep of power conferred upon the school committee and the utmost extent of the limitation placed upon the otherwise general duty and authority of the city council. Approval implies favorable conviction manifested by affirmation concerning a specific matter submitted for decision. It does not import initiative. Approval ordinarily indicates the will to assent to an act done by someone else rather than the doing of that act. See, however, *Clarke* v. *Fall River*, 219 Mass. 580. It signifies the application of sound judgment to a proposition emanating from another source and submitted for investigation. It requires the exercise of faculties of criticism and discrimination. It denotes positive sanction. It does not mean original and inventive construction in the first instance. On the other hand, it is not a mere perfunctory act. It imposes no mean responsibility. It carries power and duty of an effective nature. It is the word used in both the State and Federal Constitutions, in the charters of many cities and in R. L. c. 26, § 9, to describe the assent required by the chief executive before acts of the legislative department become operative. *Galligan* v. *Leonard*, 204 Mass. 202. *McLean* v. *Holyoke*, 216 Mass. 62.

The context in which the word occurs in the charter of the defendant confirms these general definitions. The construction of an important public building requires the preparation of plans. The body charged with the general duty of its erection naturally also attends to the preparation of plans, acting upon such suggestions as may be presented by the public board by which it is to be used. The power to erect a building commonly embraces the doing of all things necessary to its completion including suitable plans. *Vinal* v. *Nahant*, 232 Mass. 412. It would be a strained construction of the word to say that the right to employ an architect and cause him to make full plans and specifications followed

as a necessary consequence of the power to approve plans. If that had been the purpose of the Legislature, apt words to that end naturally would have been used: the duty of preparation instead of approval of plans would have been reposed in the school committee. The words of the statute cannot be stretched beyond their natural meaning, but must be interpreted as found. Doubtless, that the important project of erecting a school house may go forward in orderly fashion, there must be co-operation between the two boards and co-ordination of their work according to their respective functions. But it must follow the terms of the charter.

The school committee was not empowered to make the defendant responsible in contract to the plaintiff. The defendant's request for a finding in its favor should have been granted. The exceptions are sustained and under St. 1909, c. 236, § 1, judgment may be entered for the defendant.

So ordered.

W. B. MANUFACTURING COMPANY *vs.* JOSEPH RUBENSTEIN & another.

Suffolk. June 22, 1920. — June 23, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Unfair Competition. Trade Name. Equity Jurisdiction, Unlawful use of trade name. *Equity Pleading and Practice,* Appeal. *Witness,* Expert. *Evidence,* Opinion: experts, Competency.

While it is the duty of this court, on an appeal from a final decree in a suit in equity with a report of all the evidence, to examine the evidence with care and to reach its own conclusion as to the facts, a finding by the trial judge after a hearing in which witnesses have been heard to testify in person will not be reversed unless plainly wrong.

A person's name is the distinctive characterization in words by which he is known and is distinguished from others.

Brothers, whose surname is Rubenstein and who are conducting business as a partnership called "Rubenstein Brothers," have no legal right to use the initials "R. B." in the name "R. B. Manufacturing Company" in competition with a corporation named "W. B. Manufacturing Company," which had established a trade reputation in connection with its name, where such use was intended to and did infringe upon the corporation's business by causing its customers through mistake to deal with the partnership.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff was entitled to, was *held* to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue.

Expert evidence to determine the cost of goods sold by the defendant in the unfair competition which was the subject of the suit above described was *held* to have been admissible where it appeared that the defendant did not furnish all the information within his control as to the cost of goods and profits made by him.

The master in the suit above described was *held* properly to have ruled that losses sustained by the defendant in selling goods at less than cost should not be deducted from profits made in the sale of other goods.

It also was *held* that the defendant in the suit above described was not entitled as of right under the circumstances to prove sales made by him to customers which were his before he began the unfair competition, thereby to establish what he might have realized as profits if he had conducted his business without attempting to appropriate the benefit of the name of the plaintiff.

After the evidence before the master had closed, the defendant moved that the hearings be reopened to permit him to introduce evidence, alleged to have been newly discovered, to the effect that certain sales, on which the master had ruled the plaintiff was entitled to a profit, were made before the period of unfair competition began. The master denied the motion. *Held*, that the denial was within the master's discretion.

A denial of a motion to recommit a report to a master is within the discretion of the trial judge and is not subject to review upon an appeal from a final decree which included such denial.

BILL IN EQUITY, filed in the Superior Court on February 13, 1918, by the W. B. Manufacturing Company, a corporation, who had adopted and registered a trademark, "W. B.," against Joseph and Benjamin Rubenstein, comprising a co-partnership who, the plaintiff alleged, were doing business in the same building with the plaintiff and in competition with it and had adopted the name "R. B. Manufacturing Company" with the purpose of acquiring the benefit and advantage of the plaintiff's trademark, the prayer of the bill being that the defendants be enjoined from such unlawful use of the name "R. B. Manufacturing Company," that they be ordered to account and pay over to the plaintiff all profits made by them and each of them from the sale of any and all merchandise by them under the name of "R. B." or "R. B. Manufacturing Company," and that they and each of them be ordered to pay to the plaintiff the damages caused to the good will and business of the plaintiff by them.

The suit was heard by *Fox*, J., a commissioner having been appointed under Equity Rule 35 to take the testimony. Material

evidence and findings of the trial judge are described in the opinion. By order of the judge an interlocutory decree was entered that the defendants "and each of them, their agents and representatives be and hereby are enjoined from using the name R. B. Manufacturing Company or any abbreviation thereof, or any other name resembling in sound or appearance the name W. B. Manufacturing Company, or likely to be confused therewith in the conduct of their business," and that the suit be referred to a master "to find and report what profits and damages if any the plaintiff" was "entitled to."

The master found that the net profit derived by the defendants from the sale of men's and boys' pants during the period of time in question was $4,411, and on the matter of damages found "that, under an order that the defendants account to the plaintiff for all profit derived from sales of pants during the period in question, the plaintiff will be compensated for all losses proved to have been sustained, and that for damages, as distinguished from an accounting for profits, the plaintiff is entitled to have damages assessed only in the nominal sum of $1."

Other material facts and rulings of the master are described in the opinion. The defendants objected and excepted to the report on the following grounds:

"1. That the plaintiff offered evidence of its knowledge of the cost of similar goods which commonly sold in the market at prices similar to those received by the defendants, against the defendants' objection and exception. There was no evidence that any of the witnesses for the plaintiff had personal knowledge of the character of the goods sold by the defendants, except the evidence of the contractor who manufactured some of them. The master erroneously ruled that the evidence was a proper matter for consideration as a part of the whole of the evidence in determining the cost where the defendants have not so kept their books that the cost might be determined with certainty."

"2. That the master erroneously ruled that losses sustained by the defendants in selling pants at less than cost should not be deducted from profits made in other sales of pants."

"3. That the master erroneously refused to permit the defendants to put in evidence showing that many of the customers, to whom they sold men's and boys' pants, were customers who had

traded with the defendants prior to the alleged competition, who had never been customers of the plaintiff, and who knew the defendants personally; the master erroneously ruling that in the accounting for profits the plaintiff was entitled to all profits which the defendants had made from the sales of men's and boys' pants during the period in question and that it was immaterial whether the plaintiff might have sold all of the goods to all of the customers if the defendants had not made the sales."

"4. That after the taking of testimony before the master had closed, the master erroneously refused to permit the defendants to introduce newly discovered evidence of one Philip Rubenstein to prove that certain sales of men's and boys' pants on which the master ruled that the plaintiff is entitled to profits, were made by the said Philip Rubenstein as agent for the defendants in 1916, before the period of unfair competition began."

The defendants also moved that the report be recommitted to the master for the taking of the testimony which was the subject of their fourth objection and exception.

The exceptions and the motion to recommit were heard by *Hammond*, J., by whose order a decree, entitled a "final decree," was entered overruling the exceptions to the master's report, denying the motion to recommit, confirming the report, permanently enjoining the defendants as prayed for, and ordering them to pay to the plaintiff the sum of $4,719 and costs of suit. The defendants appealed.

The case was submitted on briefs.

J. A. Tirrell, for the defendants.

P. W. Jacobs & J. B. Jacobs, for the plaintiff.

RUGG, C. J. This is a suit in equity wherein the plaintiff a Massachusetts corporation seeks to restrain the defendants from conducting business under the firm style of R. B. Manufacturing Company. The case was heard upon oral evidence by a judge of the Superior Court who made this finding of fact: "The plaintiff's corporate name is 'The W. B. Manufacturing Company,' and its place of business is 65 Essex Street, Boston. Before January 1, 1917, the defendants had been doing business in Fall River for many years under the name of Rubenstein Brothers, and their business was not a competing business. January 1, 1917, the defendants moved to 65 Essex Street, Boston, dropped the

name 'Rubenstein Brothers,' assumed the name 'R. B. Manufacturing Company,' and entered into active competition with the plaintiff in its own line of business. It has not been contended by either party that the object of the defendants in dropping the name by which they had been known to the trade for many years was to drop the reputation which went with it. The more probable explanation of their conduct is that they wished to get the benefit of the plaintiff's reputation."

It is the well settled rule in equity that, while it is the duty of this court on an appeal with report of the evidence to examine the evidence with care and to reach its own conclusion as to the facts, yet a finding made by the trial court after a hearing in which witnesses have been called in person to testify before him will not be reversed unless plainly wrong. *Lindsey* v. *Bird*, 193 Mass. 200. Careful consideration of this record convinces us that the finding was right. It must stand.

It is urged in behalf of the defendants that they have a legal right to use the letters R. B. on the footing that it is their name because an abbreviation for Rubenstein Brothers. It is enough to say that this contention has no foundation either in fact or in law. Initials alone do not constitute the name. Description or abbreviation is not the equivalent of a name. The distinctive characterization in words by which one is known and distinguished from others is the name of a person. *Conners* v. *Lowell*, 209 Mass. 111, 118. The right of one to use his own name in business even when the same as or like that of another has recently been considered in *Burns* v. *William J. Burns International Detective Agency*, 235 Mass. 553, where the authorities are collected. Those principles have no bearing upon the case at bar because two or more detached and separated letters of the alphabet do not constitute a name. Cases like *Commonwealth* v. *Gleason*, 110 Mass. 66, and *Carleton* v. *Rugg*, 149 Mass. 550, have no relevancy to the facts disclosed on this record.

The defendants must stand on the ground that they have no natural or superior right to the use of the designation or identifying letters selected by them for their business. The single question in this connection is whether the trade designation adopted by them is sufficiently similar to that of the plaintiff to be likely to confuse or mislead those using ordinary discrimination.

There was ample evidence that the plaintiff had established a trade reputation in connection with its name. *C. A. Briggs Co.* v. *National Wafer Co.* 215 Mass. 100. While a court of equity will not interfere to protect one against harm arising from failure on the part of purchasers to exercise ordinary attention when thereby they would be enabled to notice the difference between the two names or marks, it will not permit one to assume a trade characterization so closely like that of another as to be likely to mislead the public. *McLean* v. *Fleming,* 96 U. S. 245, 255. It seems plain, both from the nature of the designation adopted by the defendants and from the evidence specific to the effect that mistakes of identity had occurred among customers of the plaintiff, that the latter's right to be secured from unfair competition was infringed. *Reading Stove Works* v. *S. M. Howes Co.* 201 Mass. 437.

The case was referred to a master to ascertain damages and profits. He found that profits had been made but found no damages. In this there was no error of law. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 215 Mass. 136.

The master found in substance that the defendants had not furnished all the information within their control as to costs of goods and profits made by them. There was no error in the admission of evidence by the master. Whether a witness was qualified to testify as an expert was under the circumstances within the discretion of the master. *Westinghouse Electric & Manuf. Co.* v. *Wagner Electric & Manuf. Co.* 225 U. S. 604.

The rulings of the master respecting rules for computation of profits and losses were in accordance with the principles laid down in *Nelson* v. *J. H. Winchell & Co.* 203 Mass. 75, 91.

The defendants were not entitled as of right under the circumstances to show sales made by them to their old customers and establish thereby what they might have made if they had conducted their business without attempting to appropriate the benefit of the name of the plaintiff. *Saxlehner* v. *Eisner & Mendelson Co.* 138 Fed. Rep. 22. *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.* 100 Maine, 461, 479.

Whether the master should reopen the case for further hearing rested in his discretion under the circumstances. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 192 Mass. 391, 405.

Clearly whether the master's report should be recommitted was within the discretion of the court.

Decree affirmed with costs.

LOUIS LIBMAN *vs.* JOSEPH LEVENSON.
JOSEPH LEVENSON *vs.* LOUIS LIBMAN.

Suffolk. June 22, 1920. — June 23, 1920.

Present: RUGG, C. J., BRALEY, PIERCE, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, Specific performance. *Contract*, Performance and breach, Termination.

Where, before the time fixed for the performance of a contract for the sale and conveyance of land and buildings and without fault of either party to the contract, a substantial part of the real estate is destroyed, the seller, if at the time fixed for performance he has not restored the premises to substantially the condition in which they were when the contract was made, cannot maintain a suit in equity to compel specific performance of the contract, and the purchaser may maintain a suit to have the contract declared terminated and to compel the repayment to him of an amount advanced by him toward the purchase price.

BILL IN EQUITY, filed in the Superior Court on April 23, 1920, for specific performance of a contract in writing for the sale by the plaintiff to the defendant of land and buildings thereon in that part of Boston known as Dorchester; also a

BILL IN EQUITY, filed in the Superior Court on May 19, 1920, by the defendant in the first suit against the plaintiff therein, alleging the partial destruction of the premises described in the opinion and seeking a termination of this agreement and a repayment of the sum of $200 which had been paid toward the purchase price.

In the Superior Court the suits were heard together by *Hammond*, J., upon an agreed statement of facts, and by him were reported for determination by this court, "upon the stipulation that if said Levenson is entitled to prevail then a decree shall be entered cancelling the said agreement of sale and ordering said Libman to return to said Levenson the part payment made under said agreement, or such other relief as to the court shall seem just and proper; and upon the stipulation that unless as a matter of

law upon the facts stated the said Levenson has made out a good defence in the suit in which he is the respondent, then specific performance, as prayed for by said Libman, or such other relief as to the court shall seem just and proper, shall be decreed."

The cases were submitted on briefs.

H. U. Smith, for Libman.

J. J. Kaplan, J. E. Peakes & G. P. Davis, for Levenson.

RUGG, C. J. These are cross suits in equity. On March 31, 1920, the parties entered into a contract in writing whereby Libman agreed to sell a tract of real estate for $2,000 above an existing mortgage and Levenson agreed to purchase and pay for the same, "Papers to pass . . . on or before April 10, 1920." The real estate "as described in the agreement consists of a parcel of land numbered 202–208A Washington Street, Dorchester District of Boston, comprising 7,030 square feet of land and a one story brick block of six (6) stores thereon," built in 1916.

On or about April 5, 1920, a retaining wall on the rear of the premises, without any fault on the part of Libman, collapsed on account of erosion and other natural causes and fell on to and across a yard about fifteen feet in width situated between the retaining wall and the building and on to and against the rear of the building causing the greater part of the rear wall of four of the stores to collapse and breaking the windows in the front of the four stores.

No repairs were made on the premises after the collapse, and the building and premises have since remained and now are in the same damaged condition as they were immediately following the collapse.

The question is whether Levenson can be compelled to take conveyance and pay for the real estate under these circumstances or whether he is entitled to cancellation of the contract and recovery from Libman of the money already paid on account of the contract.

It is manifest from the facts that there has been a destruction or loss of a substantial part of the real estate constituting the subject matter of the contract occurring before the time fixed for performance without the fault of either party. The real question is where that loss must fall.

This hardly can be regarded as an open question in this Commonwealth. In *Thompson* v. *Gould*, 20 Pick. 134, a contract had

been made for the purchase and sale of land but before the time for performance the house thereon was burned. It was said at page 138: "Nor could this contract be enforced by a court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages." It is true that this was an action of contract and the contract was not enforceable under the statute of frauds but with the amplitude of discussion of legal questions lying within the field of the point actually involved customary with the court of that day, the whole subject was surveyed in the opinion.

The statement above quoted appears to have been accepted as the law of the Commonwealth. In *Wells* v. *Calnan*, 107 Mass. 514, an action of contract was before the court for breach of a written agreement to purchase land, where the buildings were destroyed before the deed was tendered. It was said by Mr. Justice Gray, relying in part upon *Thompson* v. *Gould* as well as upon other previous decisions fully reviewed by him, "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money." The question again was presented in an action for breach of contract in *Hawkes* v. *Kehoe*, 193 Mass. 419, where at pages 424 and 425 occurs this statement: "We need spend no time upon the numerous cases in England and in this country which the industry of counsel has brought to our notice as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. See the cases collected in 29 Am. & Eng. Encyc. of Law, (2d ed.) 712 *et seq.*, and in Ames, Cases in Eq. Jur. 228, note 2. We are

of opinion that in this Commonwealth, when, as in this case, the conveyance is to be made of the whole estate, including both land and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject matter of the contract, it is now settled by the decision in *Wells* v. *Calnan*, 107 Mass. 514, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss: but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. *Thompson* v. *Gould*, 20 Pick. 134, 138. If the change in the value of the estate is not so great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulling of the contract, specific performance may be decreed, with compensation for any breach of agreement, or relief may be given in damages. *Kares* v. *Covell*, 180 Mass. 206. *Davis* v. *Parker*, 14 Allen, 94." See also *Adams* v. *North American Ins. Co.* 210 Mass. 550. It seems to us that the weight of authority in other jurisdictions is to the same effect. *Phinizy* v. *Guernsey*, 111 Ga. 346. *Gould* v. *Murch*, 70 Maine, 288. *Wilson* v. *Clark*, 60 N. H. 352. *Smith* v. *McCluskey*, 45 Barb. 610. *Wicks* v. *Bowman*, 5 Daly, 225. *Powell* v. *Dayton, Sheridan & Grande Ronde Railroad*, 12 Ore. 488. *Huguenin* v. *Courtenay*, 21 S. C. 403. *Elmore* v. *Stephens-Russell Co.* 88 Ore. 509. *Kinney* v. *Hickox*, 24 Neb. 167.

There are decisions to the contrary collected in an article in 33 Harv. Law Rev. 813, 822 to 834. In view of the positive statements of the law already quoted from our own decisions, it does not seem necessary to review those not in harmony with them.

In the suit of *Libman* v. *Levenson* decree is to be entered dismissing the bill, and in that of *Levenson* v. *Libman* decree is to be entered declaring the agreement terminated, for the repayment to the plaintiff of the $200 paid by him on account of the contract and for his costs.

So ordered.

JOE DUART *vs.* LAFOREST L. SIMMONS.

Bristol. June 22, 1920. — June 23, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Superior Court. Judgment. Writ of Error.

Where, by a writ of error a judgment of the Superior Court is taken to the Supreme Court of the United States and the writ there is dismissed for want of jurisdiction, (the mandate of that court, issued more than a year and three months after the judgment in the Superior Court, directing that the cause be remanded to the Superior Court for such proceedings as "ought to be had therein, the said writ of error notwithstanding,") the Superior Court has no further power over the judgment, which remained in full force and effect, and has no power to grant a motion by the defendant that the judgment be "set aside," or a motion by the plaintiff that it be affirmed, or to order a judgment following the mandate.

TORT by a longshoreman, employed by one Davis, an independent contractor, for personal injuries sustained on April 20, 1915, while shovelling coal in unloading a schooner lying at the defendant's wharf and coal yards on the Taunton River in the town of Somerset, which was used by the defendant to bring coal from the State of New Jersey to his wharf. Writ dated July 23, 1915.

The action previously was before this court upon exceptions saved by the defendant at a trial in the Superior Court, and by a decision reported in 231 Mass. 313, the exceptions were overruled. Thereafter, on December 18, 1918, judgment was entered for the plaintiff. On December 20, 1918, upon application by the defendant, a writ of error to the Supreme Court of the United States was issued. That court on March 1, 1920, dismissed the writ for want of jurisdiction and the defendant on March 31, 1920, moved in the Superior Court that the judgment for the plaintiff be "set aside." The motion was denied and the defendant excepted. The mandate of the Supreme Court of the United States, dated April 23, 1920, was filed in the Superior Court on April 26, 1920, and on April 30 the plaintiff moved for affirmation of the judgment in his favor. The motion was allowed and the defendant excepted.

The case was submitted on briefs.

E. C. Stone, for the defendant.

D. R. Radovsky, for the plaintiff.

RUGG, C. J. This cause of action arises from the facts that the plaintiff, an employee of an independent contractor, was injured, while working in the hold of a barge in discharging coal, by reason of the fall of a tub caused by the parting of a rope owned by the defendant and by him furnished for the unloading of his cargo from the barge. The case was before us in 231 Mass. 313. One issue then presented was whether the defendant was exonerated from liability in an action at law because he was a subscriber under the workmen's compensation act. Since the injury arose upon a vessel, plying in interstate commerce between different ports of this country, while it was lying at wharf in navigable waters, we felt constrained by the controlling authority of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, to hold that the workmen's compensation act did not apply to an injury so received. The judge in the Superior Court had thus ruled. The case then went to trial to a jury as an ordinary action of tort. The case came before us on the defendant's exceptions, which are set forth at length in the earlier decision. The exceptions were overruled and judgment was entered in favor of the plaintiff in the Superior Court on December 18, 1918. Thereafter the case was taken to the Supreme Court of the United States on writ of error. It was disposed of on March 1, 1920, in a *per curiam* opinion to the effect that it be "Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726." *Simmons* v. *Duart*, 251 U. S. 547. A mandate issued from the United States Supreme Court under date of April 23, 1920, to the effect that the cause was remanded to the Superior Court for such proceedings as "ought to be had therein, the said writ of error notwithstanding." The defendant filed a motion in the Superior Court on March 31, 1920, praying that the judgment be set aside chiefly on the ground that under the decision in *Chelentis* v. *Luckenbach Steamship Co. Inc.* 247 U. S. 372, the plaintiff could not prevail in an action at common law and that no other relief was open. Requests for rulings of law based upon the same decision were presented by the defendant. These requests were refused, the

motion of the defendant was denied and upon a motion by the plaintiff, judgment for the plaintiff was affirmed, to all of which the defendant excepted.

The verdict for the plaintiff was rendered on April 12, 1918. The decision in *Chelentis* v. *Luckenbach Steamship Co. Inc., supra,* was delivered six days later. It is manifest from these dates as well as from the record that the case could not have been and was not tried to the jury upon the view of maritime law announced in that decision.

The case could not go to the United States Supreme Court except after final judgment in the Superior Court. Judicial Code, § 237 as amended. The writ of error did not vacate that judgment. It continued in force until reversed. That judgment never was reversed and hence was never vacated. *Railway Co.* v. *Twombly,* 100 U. S. 78, 81. Therefore the defendant's motion and requests for rulings were denied rightly. It follows that there was no occasion for the motion by the plaintiff. The judgment previously entered could not be affirmed, because it had not been reversed nor modified and therefore stood continuously as originally entered. The Superior Court had no power over its final judgment at that time except to execute the mandate of the Supreme Court of the United States. Since that mandate contained no order for corrective action there was nothing to be done in the Superior Court. Its judgment previously entered remained in full force and effect. *Goodrich* v. *Wilson,* 135 Mass. 31. The defendant's motion does not come within the provisions of R. L. c. 193, §§ 14 to 20.

It is manifest that there was no want of jurisdiction over either party or the cause of action in the court apparent on the record. *Proctor* v. *Dillon,* 235 Mass. 538.

The mandate from the Supreme Court of the United States contains no order respecting costs. Hence the Superior Court could make no new order touching that subject. The order of the Superior Court for judgment, dated May 1, 1920, must be set aside and the plaintiff's motion should have been denied. St. 1913, c. 716, § 3. The defendant's exceptions must be overruled.

So ordered.

BLUMA ZINKFEIN *vs.* W. T. GRANT COMPANY.

Essex. January 20, 1920. — June 24, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

False Imprisonment. False Arrest. Pleading, Civil, Declaration. *Slander.*

In a count in a declaration in an action of tort by a woman against a corporation owning and conducting a department store, the plaintiff alleged "that she is a person of good fame and credit, yet the defendant by its servants and agents, . . . wickedly contriving and maliciously intending to injure the plaintiff, destroy her character and reputation and expose her to trouble did falsely and maliciously accuse without any just and probable cause, that she had stolen certain merchandise from its store, whereupon it caused her to be arrested and she was arrested by means of said false and malicious accusations and imprisoned in a room in the building . . . [a court house] and without being brought before any court or without any complaint being made upon such accusation, she was permitted after such imprisonment to leave said room . . . that she was entirely clear and innocent of the said charge of larceny and that by means of the false and malicious accusations of the defendant, by its servants and agents she had suffered imprisonment and thereby she hath suffered great ignominy and reproach." *Held*, that in legal effect the plaintiff sought to recover for the causing of her arrest unlawfully, and not for the slanderous words used; and that the count did not charge malicious prosecution.

In a second count of the declaration in the action above described the plaintiff alleged that the defendant by its servants and agents falsely imprisoned the plaintiff. At the trial of the action, it appeared that, a store detective employed by the defendant having seen two persons stealing ribbon valued at $5 from the store, one of them was apprehended and the other escaped. The next day, while the general manager of the store and the store detective were in a district court room as witnesses for the trial of the apprehended woman, the detective saw the plaintiff, and, speaking to the manager and to a police inspector, accused her of the theft. The police inspector thereupon ordered the plaintiff into another room in the same building where she was confined against her will and was further examined by him and by the chief of police in the presence of the sales manager and the store detective, who persisted in their accusation, and of an interpreter and a stenographer, and that, during the confinement and examination, her husband was refused admission to the room by the police inspector, who told him that she was "arrested." The plaintiff later was released from the room, was never brought before any court, no complaint was made against her and no warrant for her arrest was asked for, nor did the defendant ask police authorities for any investigation of the charge against her. The plaintiff had nothing to do with the theft from the defendant's store. The judge refused to order a verdict for the defendant, and there was a finding for the plaintiff. *Held*, that

(1) There being no evidence to warrant a finding that the acts of the police inspector were done otherwise than on his own initiative and judgment, a finding was not warranted that the defendant by its servants and agents unlawfully arrested the plaintiff, and a verdict should have been ordered for the defendant on the second count;

(2) For the same reason, a finding was not warranted that the defendant caused the plaintiff to be falsely arrested, and a verdict should have been ordered for the defendant on the first count;

(3) *Whether* knowledge on the part of the defendant, its servants or agents, of the falsity of the charge against the plaintiff or of facts which would have been the equivalent of such knowledge, and the malice inferable therefrom would have been sufficient to render the defendant liable in an action for false imprisonment, here was not determined, because no evidence was offered justifying the finding of such facts;

(4) The crime charged against the plaintiff by the defendant's manager and detective was a misdemeanor;

(5) *It seems*, that the plaintiff was not remediless, since an action will lie for a slanderous charge of a crime made in the presence of a police officer.

TORT, with a declaration in three counts. Writ dated October 23, 1916.

The first count of the declaration was as follows: "And the plaintiff says that she is a person of good fame and credit, yet the defendant by its servants and agents, . . . wickedly contriving and maliciously intending to injure the plaintiff, destroy her character and reputation and expose her to trouble did falsely and maliciously accuse without any just and probable cause, that she had stolen certain merchandise from its store, whereupon it caused her to be arrested and she was arrested by means of said false and malicious accusations and imprisoned in a room in the building . . . [a court house] and without being brought before any court or without any complaint being made upon such accusation, she was permitted after such imprisonment to leave said room. Now the said plaintiff, in fact says that she was entirely clear and innocent of the said charge of larceny and that by means of the false and malicious accusations of the defendant, by its servants and agents she had suffered imprisonment and thereby she hath suffered great ignominy and reproach."

In the second count false imprisonment of the plaintiff was alleged and in the third count slander was alleged.

In the Superior Court the action was tried before *Quinn*, J. The material evidence is described in the opinion. At the close of the evidence the defendant moved that verdicts be ordered in

its favor on the first and second counts. The motion was denied, and the jury found for the plaintiff on the first and second counts in the sum of $200. The defendant alleged exceptions, which, the bill of exceptions stated, "concern only the first and second counts."

The case was submitted on briefs.

C. N. Barney & W. A. Bishop, for the defendant.

P. A. Kiely, for the plaintiff.

JENNEY, J. The declaration is in three counts, two of which are now involved. The record gives no information concerning the disposition made of the third count, which is for slander.

The first count avers that, although the plaintiff was innocent, the defendant falsely, maliciously, and without probable cause accused her of the theft of merchandise from its store, whereupon it caused her to be arrested and imprisoned on said charge, without the prior making of any complaint or the issuance of any warrant authorizing her detention; and that she was discharged from arrest without having been brought before any court. In legal effect, the plaintiff seeks to recover damages for her arrest and not for the slanderous words used.

The second count alleges that the defendant "by its servants and agents maliciously and with intent to injure this plaintiff, did, by force and against [her] will" imprison her without reasonable cause and without right or authority.

The defendant is a corporation conducting department stores in several cities. On December 11, 1914, two women came into its store in Lynn and "stole ribbon to the value of $5." One of these, Annie Norkas, was apprehended at the time, and the other escaped. A female detective employed in the store by the defendant saw the occurrence. The general manager, who "was the [person] highest in authority in the employ of the defendant in Lynn," also saw the woman who committed the theft. "It was the duty of this . . . detective to watch people in the store, to prevent them from stealing, if possible, and if merchandise was stolen to cause them [the guilty persons] to be arrested." The next day Annie Norkas was tried for this theft in the district court in Lynn. While the general manager and the detective were in the court room as witnesses at this trial, the latter there saw the plaintiff, who happened to be present as a witness in an-

other case. Whereupon the detective "came up" to the plaintiff, looked at her, and said to the manager, "There is the other woman that stole the ribbon from our store," and then asked some one standing near by, "Where is there a police officer?" Stacey R. Burckes, a police inspector of Lynn, "happened to come along at that moment;" and the detective, in the presence of the manager, repeated the charge to him, stating that "the plaintiff had taken ribbon at the value of $5 from the counter of the defendant's store, handing them to another woman to put them in her bag." The inspector ordered the plaintiff, who knew that he was a police officer, to come with him; and she went with him into the room of the probation officer in the same building. While going to this room, the manager and the detective each repeated the charge of theft. The evidence clearly warranted a finding that the plaintiff was imprisoned in this room by the inspector, who locked the door and refused to permit her to leave. In the room at this time were also the chief of police of Lynn, the manager, the private detective, an interpreter and a stenographer. The complete story of what there happened is as follows:

"She [the plaintiff] told them that she was never in the defendant's store. The inspector put his hand on the door so that the plaintiff could not go out. The chief of police said to the store detective, 'The plaintiff says she did not steal anything from your store; that she never was in your store.' The store detective said, 'I know she is the woman. This is the woman.' The inspector said to the plaintiff, 'Tell where you put the ribbon or you will be put to jail.' The plaintiff replied, 'I never stole in my life. You know me. I keep a store.' The police inspector said, 'Yes, I know this lady. I do not think she stole this ribbon, as she has a store of her own and sells ribbon.' The store manager said, 'She is the woman who stole.'

"The plaintiff's husband knocked at the door and said, 'I want my wife to come out of the room.' The police inspector said, 'She is arrested,' and shut the door in his face. A little later she was released from the room. She was not brought before any court. The district court was then in session. No complaint was made against her, and no warrant for her arrest asked for. The defendant did not make any complaint at the police headquarters and did not ask for any investigation . . .

of the charge against the plaintiff. The defendant did not ask police inspector Burckes to investigate the charge, neither did the defendant make any investigation of the plaintiff, as to who she was or what her business was."

The exceptions further recite:

"The statement of the store manager and the store detective that the plaintiff had stolen merchandise was not true. The plaintiff did not steal any merchandise from the defendant's store; she did not know Annie Norkas; was never with her; was never in the defendant's store. She had nothing to do with the larceny of the merchandise from the defendant's store. There was nothing suspicious about the plaintiff."

At the close of the evidence, the defendant moved that a verdict be ordered in its favor on the first and second counts, on the pleadings and evidence. The motion was denied, subject to exception, and a general verdict of $200 for the plaintiff was returned on these counts.

The jury should have been instructed that the plaintiff was not entitled to a verdict on the second count, which was for false imprisonment. While there was evidence that the manager and detective acted within the authority conferred upon them, (*Mills* v. *W. T. Grant Co.* 233 Mass. 140,) all that they did was to charge the plaintiff with theft. They did not take part, except by their presence, in the plaintiff's detention, or in the subsequent proceedings. It is clear that the police detective proceeded wholly on his own initiative and judgment and in the performance of his duty as a public officer in all that he did, and not in behalf of the corporation or at the direction of its representatives. In an action for false imprisonment, where a wrongful arrest has been made on information given by a defendant, there is no liability on the part of the informant for the arrest unless the officer acted under the direction of the defendant or as his agent. *Dixon* v. *New England Railroad,* 179 Mass. 242. *Burnham* v. *Collateral Loan Co.* 179 Mass. 268. *Sewell* v. *National Telephone Co. Ltd.,* [1907] 1 K. B. 557. See *Robinson* v. *Van Auken,* 190 Mass. 161; *Mason* v. *Jacot,* 235 Mass. 521. Whether knowledge of the falsity of a charge made, or the equivalent of knowledge, and the malice inferable therefrom or otherwise proved, are sufficient to render a defendant liable in an action for false imprisonment, when the

arrest was not made by him or in his behalf or under his direction, and where the arrest was not made on any legal process, need not be considered. See *Stone* v. *Crocker*, 24 Pick. 81; *Mullen* v. *Brown*, 138 Mass. 114; *Wood* v. *Graves*, 144 Mass. 365; *Everett* v. *Henderson*, 146 Mass. 89; *Swift* v. *Witchard*, 103 Ga. 193. The plaintiff, on whom the burden rested to prove such facts, assuming that they were material, offered no evidence justifying a finding that the accusation, when made, was known to be untrue or that it was made in reckless disregard of the plaintiff's rights or that there was actual malice in its utterance.

Inasmuch as the defendant was not liable for the arrest in an action for false imprisonment, it is not material whether the accusation was of a felony or a misdemeanor. But as the case may be tried again, the question is considered. There was nothing in the charge to indicate that the property when stolen was "under the protection of the building, placed there for safe keeping, and not under the eye or personal care of some one in the building" (*Commonwealth* v. *Lester*, 129 Mass. 101, 103); and the value of the property being under $100, the crime charged was a misdemeanor. R. L. c. 208, §§ 20, 26; c. 215, § 1.

The first count, described in the bill of exceptions as one "for causing the plaintiff to be falsely arrested," also is for false arrest. On the facts of this case there can be no valid distinction between a liability for an arrest directly charged as made by the defendant and that for causing another to make it. In both cases if the arrest is so caused and directed as to make the act that of the defendant, liability follows on precisely the same grounds. The first count did not charge malicious prosecution, because it was not alleged that there was a proceeding preferred in court and because the existence and sufficient termination of such prosecution are essential elements in an action for malicious prosecution. *Stone* v. *Crocker*, *supra*, at page 87. *Cardival* v. *Smith*, 109 Mass. 158. *Mitchell* v. *Donanski*, 28 R. I. 94. *O'Driscoll* v. *M'Burney*, 2 Nott & M'Cord, 54. *Heyward* v. *Cuthbert*, 4 M'Cord, 354. *Clarke* v. *Postan*, 6 C. & P. 423, and *Dawson* v. *Vansandau*, 11 Wkly. Rep. 516, so far as at variance with this fundamental requirement, must be disregarded. The remedy for an imprisonment wrongfully caused must be either in a direct action for trespass, or in that for malicious prosecution.

It does not follow that one in the situation of the plaintiff is remediless, for an action will lie for a slanderous charge of a crime made in the presence of a police officer. *Bodwell* v. *Osgood*, 3 Pick. 379. *Robinson* v. *Van Auken*, *supra*. *Mills* v. *W. T. Grant Co.* *supra*. See Bigelow, Lead. Cas. Torts, 205; 1 Am. Lead. Cas. (5th ed.) 258.

In the opinion of a majority of the court, the defendant's motion that a verdict be ordered in its favor upon the first count, as well as upon the second, should have been allowed, and the exceptions must be sustained; and it is

So ordered.

LOUVIA L. MOULTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 2, 1920. — June 24, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Negligence, Elevated railway. *Practice, Civil*, Judge's charge.

At the trial of an action of tort by a woman against a corporation operating an elevated railway for personal injuries alleged to have been received by the plaintiff when a passenger on a car of the defendant, there was evidence tending to show that, previous to her injury, the plaintiff was standing with her shoulder against a door opening from the middle of the side of the car, that the car was very crowded so that she had no opportunity to hold to a strap and could not move, that, as the train approached a station where she intended to alight and while it still was moving at the rate of ten or twelve miles an hour, the door against which she was leaning was opened by an employee of the defendant and she was pushed by the crowd to the station platform and was thrown to her hands and knees. *Held*, that the evidence warranted a finding of negligence of an employee of the defendant.

The defendant at the trial of the action above described asked the judge to instruct the jury that it was "not negligent for a guard or brakeman to open the door of a car before the train comes to a stop as the train comes into a station." The judge instructed the jury that "the opening of the door . . . standing by itself alone . . ., even although it was before the car had fully arrived at . . . [the station], is not negligent on the part of the defendant and does not give the right to the plaintiff in and of itself to recover." *Held*, that the defendant had no ground for complaint of the manner in which the request was dealt with, and that there was no error in the instruction given.

The defendant alleged an exception to certain portions of the judge's charge at the trial above described, arguing that the jury were permitted to find the defendant negligent simply because the car became crowded following the plaintiff's entry; but, upon an examination of the whole charge, it was *held*, that the jury were instructed that the plaintiff could not recover merely because the door was opened before the car reached the station, nor because of the crowded condition of the car without reference to the other facts in the case; and that, from the whole charge, the jury could not have understood that they could find the defendant to have been at fault simply because the car became crowded after the plaintiff became a passenger.

The defendant, at the trial above described, also alleged an exception on the ground that the jury were instructed to find for the plaintiff if she was injured only by reason of the crowding of the other passengers, but it was *held* that, although some parts of the charge were open to that objection, taking the charge in its entirety, it appeared that the jury were correctly instructed and that there was no reversible error.

TORT for personal injuries alleged to have been received on November 30, 1917, when the plaintiff, a passenger on an elevated train of the defendant, was thrown from a crowded car upon the opening of the centre door before the train came to a stop at Thompson Square station in Boston. Writ dated March 11, 1918.

In the Superior Court, the action was tried before *White*, J. Material evidence and exceptions saved by the defendant are described in the opinion. The jury found for the plaintiff in the sum of $2,100; and the defendant alleged exceptions.

The case was argued at the bar in March, 1920, before *Rugg*, C. J., *Braley*, *Crosby*, *Carroll*, & *Jenney*, JJ., and afterwards was submitted on briefs to all the Justices.

J. T. Hughes, for the defendant.

S. Kalesky, for the plaintiff.

CARROLL, J. The plaintiff, a passenger on one of the defendant's cars, was injured. She testified that as she approached her destination she left her seat and stood in the centre of the car with her shoulder against the door; that the car was "crowded" and "jammed" and contained two or three hundred people; that she had no opportunity to hold on to a strap and because of the crowd could not move; that as the car approached Thompson Square, her destination, and while the train was moving at the rate of ten or twelve miles an hour, the centre door against which she was leaning was opened and the crowd pushed her from the car to the platform where she was thrown on her hands and knees,

the car proceeding from this point about sixty feet before it came to a stop. She further testified that to the best of her knowledge she was the only passenger who left the car by the centre door at this station. The defendant's motion for a directed verdict was denied.

On the evidence presented it was for the jury to say whether the defendant was negligent; the judge could not grant the defendant's motion. The opening of the centre door of such a car as is in use on the defendant's railway, when the train is moving and the car is so crowded that some of the passengers could not move, is evidence of negligence. Under such circumstances the defendant should have known that its passengers might be exposed to injury and it was possible to have prevented it. While the mere fact that a car is crowded is not of itself evidence of negligence and a street railway company is not at fault in failing to prevent passengers from crowding, if there is no reason to expect that anything unusual will happen, *Willworth* v. *Boston Elevated Railway*, 188 Mass. 220, 222, *Field* v. *Boston Elevated Railway*, 188 Mass. 222, *Seale* v. *Boston Elevated Railway*, 214 Mass. 59, *MacGilvray* v. *Boston Elevated Railway*, 229 Mass. 65, *Knowles* v. *Boston Elevated Railway*, 233 Mass. 347, such a carrier of passengers may be found to be negligent if it permits the centre door of a crowded car to be opened while the car is in motion, and where passengers may be pushed or crowded from it; even though there would be no negligence in permitting the car to be crowded, and the mere opening of a door might not be careless under ordinary conditions. The fact that the car was overcrowded called for such care on the defendant's part as was appropriate to this condition and there was no error in submitting the case to the jury. The case at bar is to be distinguished from *Knowles* v. *Boston Elevated Railway*, *supra*, where the plaintiff's case rested on the fact that the car was crowded.

The defendant asked the trial judge to instruct the jury: "It is not negligent for a guard or brakeman to open the door of a car before the train comes to a stop as the train comes into a station." The defendant cannot complain of the manner in which this request was dealt with by the presiding judge. He told the jury that "the opening of the door . . . standing by itself alone is not, even although it was before the car had fully

arrived at Thompson Square, is not negligent on the part of the defendant and does not give the right to the plaintiff in and of itself to recover." We find no error in the instruction given. The mere opening of a car door while the car is moving, is not of itself an invitation to alight from the car, and does not show that the carrier was negligent, *Hannon* v. *Boston Elevated Railway*, 182 Mass. 425, 426, *Elger* v. *Boston Elevated Railway*, 226 Mass. 84, although it may be evidence of negligence to open the door of a moving car where, because of the crowd, a passenger is unable to hold her place when the door is opened, and injury to her might be anticipated. See *Hannon* v. *Boston Elevated Railway*, *supra*, at page 427.

The defendant excepted to that part of the judge's charge where the jury were instructed with reference to the crowding of the car after the plaintiff became a passenger. It is settled that no negligence is shown by the mere crowding of a car and it is immaterial that the crowding took place after the plaintiff became a passenger. *Knowles* v. *Boston Elevated Railway*, *supra*. *Willworth* v. *Boston Elevated Railway*, *supra*.

While the judge in the course of his charge called the jury's attention to the fact that the defendant permitted the car to become crowded after the plaintiff entered, and that this circumstance might be of importance in determining the liability of the defendant, we do not think the jury were misled by the statement, nor instructed to consider the crowding of the car apart from the other circumstances in the case and to find the defendant negligent simply because the car became crowded following the plaintiff's entry. The jury were distinctly told that the plaintiff complained because the car was so packed with people that she was held with her shoulder against the door; that the door was opened and she was pushed from the moving car. They were told that the plaintiff could not recover merely because the door was opened before the car reached the station, nor because of the crowded condition of the car without reference to the other facts in the case; and taking the charge as a whole, the jury could not have understood that they could find the defendant to have been at fault simply because the car became crowded after the plaintiff became a passenger.

The defendant also excepted to that portion of the charge

where the jury's attention was called to the pushing of the crowd against the plaintiff, — the defendant contending that the jury were instructed to find for the plaintiff if, only by reason of the crowding of the other passengers, she was injured. The pushing and crowding of passengers in their haste to get on and off a street car is one of the incidents of such travel and for this, standing by itself, the defendant was not responsible. While there are some parts of the charge which, taken alone, tend to support the defendant's contention, we cannot think that the jury were misled in this respect. In fact, after referring to the crowded condition of the car and the plaintiff's position, the judge called the jury's attention to the point whether, under the circumstances, the guard should not have reasonably anticipated that there might be danger in opening the door. Near the end of the charge they were told that the defendant was not responsible for such action of the passengers as it had no reason to anticipate; and that they were called upon to decide whether, in view of the crowded condition of the car, there was danger in opening the door without warning. Although some parts of the charge are open to the defendant's contention, taking it in its entirety, in the opinion of a majority of the court the jury were correctly instructed and there was no reversible error.

Exceptions overruled.

MICHAEL McDONOUGH *vs.* NEIGHBORHOOD CLUB OF SWAMPSCOTT, INC.

Essex. March 4, 1920. — June 24, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Way, Private. *Deed*, Construction.

At the hearing of a petition for the registration of the title to a parcel of land, it appeared that the respondent owned land adjoining that of the petitioner, and that the petitioner claimed a right of way over the respondent's land. The parties derived their titles from a common grantor, the entire parcel having been used by him as a pasture. The petitioner's land was the first to be conveyed by the common grantor, and the deed described it as bounded by H Street, one boundary stated in the deed being northerly by "a proposed new street to be called 'Range Road,'" and the words of the deed excluded from the conveyance a portion of the land on the corner of H Street and Range Road, referring to a

plan "to be recorded herewith," which showed the land bounded by the proposed street. Further provisions of the deed were: "The grantee is given no rights in the projected street to be called 'Range Road' Northwesterly of the Northwesterly lot line extended. The width of Range Road and the time when it is to be built is at the option of the grantors. There shall be no inference from this deed that when Range Road is constructed or accepted by the Town that this grantee takes title to the centre of the road." At the time of the conveyance no way was laid out or was in use over the grantor's land, and the land was below the level of the street. Without having constructed any way, the common grantor conveyed to the respondent a tract of land immediately adjoining the northerly boundary of the land previously conveyed to the petitioner. *Held*, that the petitioner had no right of way over the land of the respondent.

PETITION, filed in the Land Court on December 18, 1918, for the registration of the title to a parcel of land on Humphrey Street in Swampscott.

In the Land Court the petition was heard by *Davis*, J. The subject of the controversy between the parties was, whether the petitioner had a right of way over land of the respondent, an adjoining owner. Material facts are described in the opinion. The judge of the Land Court ruled that there was no such right of way; and the petitioner alleged exceptions.

A. B. Tolman, for the petitioner.

C. S. Tilden, for the respondent.

CARROLL, J. This is a petition to register the title to a tract of land in Swampscott. The petitioner contends that there is appurtenant to his land a right of way over the respondent's land. Each party derives title from a common grantor, hereinafter called the Palmer Estate, who, prior to 1910, used the entire tract, including the land of the petitioner and of the respondent, as a pasture. The petitioner's lot was conveyed by the Palmer estate to one Anderson, the deed describing it as bounded by Humphrey Street and northerly by "a proposed new street to be called 'Range Road;'" and excluding from the conveyance a portion of the land on the corner of Humphrey Street and Range Road and referring to a plan "to be recorded herewith," showing the land to be bounded by the proposed street. The deed then provided: "The grantee is given no rights in the projected street to be called 'Range Road' Northwesterly of the Northwesterly lot line extended. The width of Range Road and the time when it is to be built is at the option of the grantors. There shall be no inference from this deed that when Range Road is constructed or ac-

cepted by the Town that this grantee takes title to the centre of the road." When this conveyance was made there was a stone wall along the northwesterly line of Humphrey Street, extending from the railroad past the property now owned by the respondent and the proposed Range Road, and continuing by the petitioner's lot. On this wall was an old fence in poor repair; back of it the land was low, — near the street line being about two feet below the level of the street. Range Road has never been laid out nor prepared for travel. In June, 1915, the respondent acquired title from the Palmer estate to the land north of the petitioner's property, and built a club-house thereon. It graded the land to the petitioner's northerly line, filling in the projected road to a height of five feet above his land, and planted trees close to the boundary line, preventing the use as a way of the land marked "Range Road" on the plan.

The question before us is the construction of the deed from the Palmer estate to Anderson and the determination of the intention of the parties to the transaction. *Regan* v. *Boston Gas Light Co.* 137 Mass. 37, 43. *Crocker* v. *Cutting*, 181 Mass. 146, 151. Considering both the deed and the plan, was the grantee given the right of way over the adjoining land, as shown by the plan locating the proposed street? Or, was the grantee given the right to use the street only as, and when, it should be built by the grantors? The lot conveyed was a part of a large pasture. The land was below the level of the street and no way, as shown on the plan, was laid out or constructed, or was in use at the time; it did not exist except upon the plan. As the plan was a part of the contract, if the deed by its language had simply bounded the lot by the proposed street as set out on the plan, the petitioner could contend that the right of way was appurtenant to his land. *Ralph* v. *Clifford*, 224 Mass. 58. *Lagorio* v. *Lewenberg*, 226 Mass. 464. See *O'Linda* v. *Lothrop*, 21 Pick. 292. But the deed by its terms limited and defined the rights of the grantee. If the way should be built by the grantors he was to have no right to use it beyond the depth of the lot. The entire fee of the land was to remain in the grantors. The grantee had no interest in it, either as it then was or as it might be if a street were constructed, except the right to use it as a way. The width of the street was to be in the discretion of the grantors, and finally, the time when it was to be

built was left entirely to their decision. They may have contemplated the construction of a street in the development of their remaining land; but they were not bound to any plan of development and were under no obligation to construct the proposed street. They might take down the wall, fill in the land and construct the way; but they were not required to do these things, and the restrictions in the deed regarding the proposed way were to govern the rights of the parties. If the grantors decided to build, the width of the road might be more or less than fifty feet; and it was over this road as constructed, not over the strip of land shown on the plan, that the grantee was given the right of way. The terms of the contract show that the grantors' intention was that the rights of the grantee were confined to the way as it might be built, and that these rights could be defined only when such event took place. In addition, the grantors reserved to themselves the exclusive right to decide when that should be. There was, in fact, no grant of a definite right of way over the grantors' land, but merely the right to use the particular way when and as it should be constructed by the grantors; and the grantee was given no right to use the strip until this was done. As the heirs of the Palmer estate had already parted with their interest in the adjoining land and the grantors did not covenant that the way would ever be built, and as it has not been constructed by them, the petitioner can claim no rights to the use of the respondent's land.

In the opinion of a majority of the court the exceptions are overruled.

So ordered.

JOHN H. HOGAN'S CASE.

Suffolk. March 29, 1920. — June 24, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Employer. *Agency*, Existence of relation.

A teamster in the general employ of a firm drove his team from his employer's stable to the "stand" of another firm, from whom he received only general directions to go to a freight house, get some wool and deliver it where ordered. In the doing of the work he was left entirely to himself. His wages were paid

by his general employer and he was subject to that employer's orders as to the management of the team. In unloading wool at a warehouse of a third firm, apparatus, furnished by that firm but attached by him to the load, broke away and he was injured. In proceedings under the workmen's compensation act, it was *held*, that

(1) In the absence of evidence showing control of the teamster by the second firm, it was presumed that authority over him remained in the general employer;

(2) A finding was warranted that the teamster when injured was in the employ of his general employer;

(3) A decree directing that compensation be paid by the insurer of the general employer was warranted.

CERTIFICATION under the workmen's compensation act of a decision of the Industrial Accident Board awarding compensation to the claimant, to be paid by the insurer of M. J. McCarthy and Company, in whose employ the claimant was found to have been when injured.

In the Superior Court, by order of *Wait*, J., a decree was entered in accordance with the decision of the Industrial Accident Board. The insurer of M. J. McCarthy and Company appealed.

H. S. Avery, for the insurer, submitted the case on a brief.

A. T. Good & H. V. Cunningham, for the employee, submitted the case without argument or brief.

CARROLL, J. John H. Hogan, the employee, at the time he received the injury complained of, was a teamster in the general employ of M. J. McCarthy and Company. On the morning of the accident he drove the team from the general employer's stable to the Youlden, Smith and Hopkins' "stand" on Atlantic Avenue, Boston, and received an order from the foreman of that company to go to the freight house for some wool and deliver it at the storehouse of the owner. Two loads had been disposed of, and as the employee was delivering the third to the firm of Cordingly and Company at its warehouse on Summer Street, he was injured. In unloading the wool a rope and tackle owned by Cordingly and Company were used. The rope was lowered from the building to the wagon by an employee of Cordingly and Company, and Hogan fastened the tackle to one of the bags of wool, which in some way broke away from the fastening and fell upon him. Both M. J. McCarthy and Company and Youlden, Smith

and Hopkins were insured. The Industrial Accident Board found that Hogan was in the employ of M. J. McCarthy and Company when injured, and awarded compensation. From a decree of the Superior Court sustaining this finding, the insurer of M. J. McCarthy and Company appealed.

The question we have to decide is whether the finding of the Industrial Accident Board, that Hogan when injured was in the employ of M. J. McCarthy and Company, was wholly unsupported by the agreed facts and the evidence. The employee received his wages from the general employer, and in the management of the team was its servant. He was doing the work of a teamster under the special employment of Youlden, Smith and Hopkins precisely as he would have done it under his general employment if the owner of the wool had hired the general employer to do the teaming. No specific instructions were given to Hogan by Youlden, Smith and Hopkins as to the manner of delivering or unloading the wool, only the most general directions were given him, he was told to go to the freight house, get the wool and deliver it where ordered; in doing the work of loading and unloading, of transporting and delivering it, he was left entirely to himself, and no further directions were given him by Youlden, Smith and Hopkins. It is the ordinary work of a truckman to unload that which he has carried, and it could be found to be within the scope of the authority of the general employer to give specific orders to such driver, as was the employee, as to the manner in which he was to unload the wool. At least in the absence of evidence showing such control by Youlden, Smith and Hopkins, it may be presumed that the authority still continued in the general employer. The case at bar is to be distinguished from *Scribner's Case*, 231 Mass. 132, where the right and exercise of specific control as to the work of the employee passed from the general to the special employer. It might have been found (as it was found by the Industrial Accident Board), that the work which Hogan was doing when injured was within the general control of M. J. McCarthy and Company, and not of Youlden, Smith and Hopkins; and that the act of the employee at the time of the injury was one in which, under the practice of the parties, the employee continued subject to the direction and control of his general employer, and did not become subject to that of the

company to whom he was lent or hired. The case comes within the principle and authority of *Clancy's Case*, 228 Mass. 316, and *Emack's Case*, 232 Mass. 596. And see *W. S. Quinby Co.* v. *Estey*, 221 Mass. 56; *Poulson* v. *John Jarvis & Co. Ltd.* 122 L. T. Rep. 471.

Decree affirmed.

THOM A. BAILEY & another, trustees, *vs.* WALTER S. BAILEY, adminstrator, & others.

Essex. May 17, 1920. — June 24, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Devise and Legacy.

While, if a will in its entirety produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication and so mould the language of the testator as to carry into effect as far as possible the intention sufficiently declared by the whole will, the intent which calls for the application of such a rule must be one appearing from the provisions of the will and cannot be one founded on a contention based merely upon silence, conjecture or the relationship of the parties.

A widower having three sons, the first of whom had married against his wishes and was childless and under a conservatorship, made a will establishing a trust fund, the income of which was to be paid to the conservator of the first son during that son's life, and at that son's death, one half of the principal was to be given to the testator's heirs at law, the income of the other half of the principal to be paid to the first son's widow so long as she remained single. If, at the death of the first son, he left no widow, but did leave children surviving him, the fund was to be paid to the children; and if, at the death of that son, he left no widow nor children surviving him, the fund was to be given to persons named in a subsequent clause disposing of all the residue of the estate. Sixteen months after the will was made and four years before the testator's death, a daughter was born to the son in question. That son died after the testator, leaving a widow and the daughter surviving him. Subsequently the widow died, leaving the daughter surviving. Upon a bill in equity for instructions, filed by the trustee after the death of that son's widow, it was *held*, that

(1) There was nothing in the will that made certain what the testator intended should be done with one half of the trust fund upon the death of the widow of the son under conservatorship following the son's death leaving surviving him both the widow and a child;

(2) Such an intent could not be supplied;

(3) The one half of the fund in question must be disposed of under the will as residuary estate.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 3, 1919, by the trustees under the will of John Bailey, late of Haverhill, for instructions.

A guardian *ad litem* for Wilma F. Bailey, minor grandchild of the testator, was appointed.

The suit came on to be heard by *Carroll*, J., upon the pleadings and an agreed statement of facts and by him was reserved for determination by the full court.

The case was submitted on briefs.

F. H. Tilton, C. E. Sawyer & W. G. Cogswell, for the defendants.

R. F. Metcalf, guardian *ad litem*, for Wilma F. Bailey.

JENNEY, J. John Bailey died on November 10, 1916, leaving a will dated July 1, 1911, which has been duly admitted to probate. When the will was made, his wife was not living and he had three sons, Alden C., Walter S. and Thom A., all of whom survived him. Walter and Thom are still living. Alden died on December 7, 1916, leaving a widow and one child, Wilma F. Bailey, born more than sixteen months after the making of the will and four years before the death of the testator. Alden had no issue living when the will was made. His widow died on January 30, 1919, never having remarried. His marriage was against the wishes of the testator who never became entirely reconciled thereto. At the time the will was made, a conservator of the property of Alden had been appointed, and this conservatorship continued until the testator's death. The will was drafted by an "attorney at law who had then had over twenty years' experience" in general practice. The material parts of the will are:

"First. I give and bequeath to Thom A. Bailey, Volusien M. Bourneuf, and Fred S. C. Grover all of said Haverhill the sum of fifteen thousand dollars ($15,000) in trust nevertheless for the following purposes: To safely invest said sum of money and pay the income thereof to the conservator of my son, Alden C. Bailey, to be used for the benefit of my said son for his support and maintenance during the natural life of my said son. At the death of Alden C. Bailey I direct my said trustees to pay one-half of the fund then remaining in their hands to the persons who shall then be my heirs at law in equal shares; and I direct my said trustees to pay the income of the other half of said fund to the

widow of said Alden C. Bailey then surviving as long as she remains single. If at the death of said Alden C. Bailey he shall leave no widow, but shall leave children surviving him then and in that case I direct my said trustees to pay over said fund in equal shares to said children or the guardians of any who may be minors at that time. In case at the time of the death of Alden C. Bailey he shall leave no widow or children surviving him then, and in such case, I direct my said trustees to pay the amount of said fund to the parties entitled to the residue of my estate under this will."

"Fourth. I give and bequeath to each one of my grandchildren who may be living at the time of my decease, the sum of one hundred dollars ($100.00).

"Fifth. All the rest, residue and remainder of my estate, I give, bequeath and devise to my two sons, Walter S. Bailey and Thom A. Bailey in equal shares.

"To Have And To Hold to them, their heirs, executors, administrators and assigns forever."

Upon the death of Alden, one half of the trust fund provided for in the will was paid to the testator's sons, Walter and Thom, and to the guardian of his granddaughter Wilma, in equal shares.

The question here presented arises on the bill in equity brought by the present trustees under the first paragraph of the will for instructions as to the disposition of the remainder of the property held by them in trust. The terms of the will are definitely phrased. On the death of Alden leaving no widow, but leaving children, the trustees were directed to "pay over said fund" to his children. If he died leaving "no widow or children surviving him," then the trustees were directed to pay the same to "the parties entitled to the residue of my estate under this will." No direct provision was made for the contingency that has arisen, namely, the death of Alden leaving a widow and child. Such children only were to benefit by direct designation when Alden left no widow. Alden's child was entitled to receive, and did receive, on his father's death as one of the testator's heirs at law, her share in one half of the trust fund. In the first clause, the testator had in mind all those interested in his estate in the absence of any will. This clause contains provisions, upon the death of Alden, for his heirs at law. He did not forget that Alden

might leave issue and, in one contingency, gave to them the property here involved. He remembered his residuary legatees, who took under this clause in case Alden left neither children nor widow, and who were, excepting Alden, the testator's only issue. With all these clearly in mind, he omitted to provide what should become of the trust property upon the death of Alden's widow. While it is true that the will does not definitely provide for contingencies which well might have been in the mind of its maker, it cannot be construed as creating an interest other than those manifested by its terms or necessary in order to carry its provisions into effect. If the "whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 374. *Old Colony Trust Co.* v. *Sargent*, 235 Mass. 278. But the intent so to be carried into effect must be one which appears from the terms of the instrument and not one founded on a construction based merely upon silence, conjecture or the relationship of the parties. *Nickerson* v. *Bowly*, 8 Met. 424. *Jones* v. *Gane*, 205 Mass. 37, 44.

The only limitation to the children of Alden was in case he left no widow. The case is within the reason of *Springfield Safe Deposit & Trust Co.* v. *Dwelly*, 219 Mass. 65, 70, where it is said: "The bequests to his grandchildren are expressly made to depend upon a contingency which has not taken place; he has manifested no intention to make them independent of that contingency; and the court has no right to take away limitations which he chose to put upon his bounty." See also *Child* v. *Child*, 185 Mass. 376; *Sanger* v. *Bourke*, 209 Mass. 481, 486. There is nothing in the will that makes it certain what the testator desired to do in the contingency that has arisen. Hence the principle enunciated in *Metcalf* v. *Framingham Parish*, *supra*, and approved in the cases printed in a footnote,* does not apply.

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* *Phelps* v. *Phelps*, 143 Mass. 570. *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95. *Child* v. *Child*, 185 Mass. 376. *Sanger* v. *Bourke*,

It follows that Walter S. Bailey and Thom A. Bailey, the residuary devisees named in the will, are entitled to the property now held by the plaintiffs in trust, that the trustees should be instructed to pay the same to them in equal shares, and that the decree of the Probate Court should be reversed. The question of allowance to the guardian *ad litem* of Wilma F. Bailey is to be settled by a single justice.

Ordered accordingly.

IDA F. MARSHALL *vs.* EDGAR A. MARSHALL.

Middlesex. May 17, 1920. — June 24, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Husband and Wife, Separate maintenance. *Probate Court*, Jurisdiction. *Constitutional Law*, Due process of law.

Upon a petition in the Probate Court under R. L. c. 153, § 33, by a wife against her husband alleging that she was living apart from him for justifiable cause, that he failed to support her and that there had been born to them a child who still was a minor, and praying that the court would make such temporary and permanent orders as it deemed expedient concerning the petitioner's support "and the care, custody and maintenance of" the minor child, the Probate Court has jurisdiction and power, although the petitioner fails to sustain the essential allegations relating to her alleged right to separate support, to enter a decree under § 37 of that chapter, reciting that the parties were living "separately," giving to the petitioner the care and custody of the child and directing the respondent to make certain payments toward the support of the child.

The respondent in the proceedings above described was not deprived of rights without due process of law but had full opportunity to be heard upon the issues which were shown by the petition.

APPEAL to the Superior Court from a decree of the Probate Court upon a petition under R. L. c. 153, § 33, ordering "that the petitioner have the care and custody of . . . minor child of" the parties and that the respondent "pay to her toward the support of said minor child" certain sums at stated times and "that said minor child shall not be taken out of said Commonwealth without the consent of her father or of the court; and

209 Mass. 481. *Stearns* v. *Fenno*, 227 Mass. 247. *Lamb* v. *Jordan*, 233 Mass. 335.

that the father shall be permitted to see and be with such child at such times and places as may be agreed upon by the parents or as may be fixed by the court."

Two of the objections filed with the appeal were:

"4. That said decree is not founded on the allegations of the petition.

"5. That the allegations of the petition disclose that it was brought under R. L. c. 153, § 33, and the decree is not under that section."

In the Superior Court, the respondent moved "that an order be made sustaining the appeal and ordering the dismissal of the petition of the appellee for the reason that the petition was brought under R. L. c. 153, § 33, that the judge of the Probate Court did not find that the appellant either had failed without just cause to provide suitable support for the appellee or had deserted her or that she for justifiable cause was actually living apart from him, so that the said court had no authority to issue any decree upon said petition and said decree is void."

The motion was heard by *Hammond*, J. The respondent asked for the following rulings:

"1. Upon a petition brought under R. L. c. 153, § 33, and founded upon the allegations necessary to give the court jurisdiction under that section the Probate Court has no jurisdiction to make a decree under R. L. c. 153, § 37.

"2. A petition brought under R. L. c. 153, § 33, gives to the respondent, because of the allegations necessary to support such a petition, no warning that remedy is to be sought under R. L. c. 153, § 37.

"3. Upon the record it is apparent that the petition in this suit was brought under R. L. c. 153, § 33.

"4. Upon the record it is apparent that the decree entered in this suit was entered under R. L. c. 153, § 37.

"5. Upon a petition brought under R. L. c. 153, § 33, and founded upon the allegations necessary to give the court power under that section the Probate Court has no power to make a decree under R. L. c. 153, § 37.

"6. A petition brought under R. L. c. 153, § 33, gives to the respondent, because of the allegations necessary to support such a petition, no warning that remedy is to be sought under R. L.

c. 153, § 37, and entering a decree under § 37 deprives the respondent of rights without due process of law."

The judge gave the third and fourth rulings requested, refused the others, made an interlocutory order denying the motion, and, being of opinion that the correctness of the order ought to be determined by this court before further proceedings, reported the case for determination of the correctness of the rulings.

The case was submitted on briefs.

E. V. Grabill, for the respondent.

J. M. Maloney, for the petitioner.

BRALEY, J. The appellate court correctly ruled that the petition was brought under R. L. c. 153, § 33, while the decree is in accordance with § 37. The question for decision therefore is whether the Probate Court had authority to enter the decree. The material allegations which the respondent was called upon to meet are, that the petitioner is his lawful wife; that he fails to support her; that she is living apart from him for justifiable cause; and "that there has been born to them the following children: Margaret Marshall, born March 13, 1905." The relief asked is, that the court will make such temporary and permanent orders as it deems expedient concerning her support, "and the care, custody and maintenance of said minor children." It appears from the recitals in the record that the petitioner failed to sustain the essential allegations relating to her alleged right to separate support. *Bucknam* v. *Bucknam*, 176 Mass. 229. *Smith* v. *Smith*, 154 Mass. 262. *Everett* v. *Everett*, 215 U. S. 203. But by § 37, "If the parents of minor children live separately, the Probate Court shall have the same power, upon the petition of either parent, to make decrees relative to their care, custody, education and maintenance, as relative to children whose parents are divorced; and shall determine which of the parents of such children shall be entitled to such custody in accordance with the law relative to the custody of children whose parents have been divorced." The respondent under our practice was not required to file an answer, and the issues being shown by the petition, he could not have been misled. We are of opinion that the petition is sufficient to warrant a decree under § 37. The allegation that she is living apart from her husband for justifiable cause means not only actual separation, but that he had failed to perform his

matrimonial obligations. If, however, separation of the spouses was shown, the court even without passing on the question of the wife's justification could "make such temporary and permanent orders as it deemed expedient concerning . . . the care, custody and maintenance of the minor children of herself and her said husband." While the evidence is not before us the decree recites, that "it appearing to the court that said petitioner and her said husband are living separately," the petitioner is given the care and custody of their minor child, toward whose support the respondent is ordered to make certain payments until the further order of the court. The identity of the issues viewed in connection with the decree are free from doubt, namely, that the parents were living separately and that the husband and father should be required to contribute to the support of his child, the care and custody of which under certain conditions is awarded to the wife and mother. The court had jurisdiction of the parties and of their domestic relations in so far as disclosed by the record, and the respondent who appeared had a full opportunity to be heard. *Chase* v. *Proprietors of Revere House*, 232 Mass. 88, 98. If for any reason relief were denied to the wife, the judge if he deemed it expedient could under the express wording of the petition make provision for the care, custody and support of their minor child, and having determined the fundamental fact of separation, the decree which followed was not in excess of the jurisdiction of the court. See *Fourth National Bank of Boston* v. *Mead*, 214 Mass. 549. The respondent's first, second, fifth and sixth requests, and his motion to dismiss were all denied rightly, and under the terms of the report the case is to stand for further trial.

So ordered.

JAMES P. STEELE *vs.* F. W. ESTABROOK & others.

Middlesex. May 17, 1920. — June 24, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Mortgage, Of real estate. *Attorney at Law. Notice. Bona Fide Purchaser. Equity Pleading and Practice*, Appeal.

While a bill in equity, by one member of an alleged partnership against a second member and others, in association with whom it was alleged that the first defendant had wrongfully used partnership property, was pending, no notice of *lis pendens* having been filed, the plaintiff gave a mortgage of his interest in certain real estate, which was partnership property and was described in the bill in equity as such, to his counsel in the suit to secure the payment of a note for $5,000, given by him to his counsel for services rendered and to be rendered in the suit. Later a final decree was entered directing the plaintiff to convey his interest in the partnership property to the defendant partner upon payment by him of a certain sum, and thereafter by a "supplemental bill" the defendants sought a discharge of the mortgage. *Held*, that

(1) As counsel for the plaintiff, the mortgagee had actual notice of the pendency of the proceedings;

(2) The mortgage was not valid against the defendants;

(3) A decree should be entered directing the discharge of the mortgage.

A judge, who heard the "supplemental bill" above described, after the mortgagee had appeared and had filed an answer, reported the case to this court for determination of the correctness of his ruling ordering a decree directing the discharge of the mortgage. It did not appear from the report that the value of the mortgagee's services as counsel was determined. The mortgagee contended that the decree should provide for the payment to him, instead of to the plaintiff, of a sum which the final decree in the main suit had directed to be paid by the defendants to the plaintiff. *Held*, that, under the circumstances, such a provision should not be included in the decree.

No appeal lies from an interlocutory order for a decree.

BILL IN EQUITY, filed in the Superior Court on March 5, 1914, by James P. Steele against Fred W. Estabrook, John W. Estabrook, Hervey W. Estabrook, the Marlborough Grain Company and the Peoples National Bank, praying for an accounting between the plaintiff and all the defendants except the defendant bank as to all the property and assets of a partnership between the plaintiff and the defendant Hervey W. Estabrook, including the land, elevator sheds, personal property, good will, horses, wagons, grain and accounts receivable and all matters and things connected with such

partnership at the time when and after its property and business were assumed and taken over by the defendant Marlborough Grain Company and the three individual defendants.

The suit was referred to a master. In July, 1916, the plaintiff gave to his counsel the mortgage described in the opinion. A final decree was entered on May 3, 1918, ordering the plaintiff, upon payment to him by the defendants Hervey W. Estabrook and the Marlborough Grain Company of $714.35 with interest and costs of suit, to convey to the defendant Hervey W. Estabrook his interest in the assets of the partnership, including the real estate described in the opinion. From this decree the plaintiff appealed. The appeal was heard in this court in November, 1918, and on March 6, 1919, a decision was rendered which is reported in 232 Mass. 432.

On June 4, 1919, the defendants Fred W. Estabrook, John W. Estabrook, Hervey W. Estabrook and the Marlborough Grain Company, filed the "supplemental bill" described in the opinion, praying that John J. Shaughnessy and Daniel W. Steele, the plaintiff's counsel to whom he had given the mortgage described in the opinion, be summoned as parties and that the mortgage be discharged so that the plaintiff could make a conveyance of a clear title. Mr. Shaughnessy and Mr. Daniel W. Steele appeared and filed answers. The "supplemental bill" and a motion for a final decree after rescript were heard by *Hammond*, J. Material facts found by him are described in the opinion. He ordered a decree directing the discharge of the mortgage and the entry of a final decree in accordance with the rescript. The mortgagees appealed. The judge then reported the case upon the "supplemental bill" so called, the answer, the replication, the above findings of fact, the decree entered thereon and the appeals therefrom, and the order for a final decree as above set forth, for determination by the full court.

J. M. Maloney, for the mortgagees.

R. H. Beaudreau & A. P. Worthen, for the Marlborough Grain Company.

CARROLL, J. In *Steele* v. *Estabrook*, 232 Mass. 432, the plaintiff was directed to convey his interest in certain real estate, described in his bill of complaint, to the defendant Hervey W. Estabrook. The rescript was filed on March 6, 1919. After the

bill had been entered and while the suit was pending, the plaintiff, James P. Steele, in July, 1916, executed and delivered to John J. Shaughnessy and Daniel W. Steele, a mortgage of this real estate, to secure the payment of a demand note for the sum of $5,000 given them for their services already performed and to be performed as counsel in the case. There was no notice of *lis pendens* on file in the registry of deeds at the time the mortgage was recorded. The defendants, on June 14, 1919, filed a supplemental bill, so called, alleging that the mortgage was given and praying that the mortgagees Shaughnessy and Steele be ordered to discharge the same. The case came on to be heard upon the supplemental bill, the answer of the plaintiff and his attorneys, the replication, and the motion of the defendants for a final decree. The judge of the Superior Court did not pass on the value of the services of the mortgagees, but ruled that the mortgage was invalid against the defendants, and entered a decree directing Shaughnessy and Steele to discharge the mortgage on the records in the registry of deeds within ten days of the date of the entry of the decree. The mortgagees appealed. Thereafter it was ordered that a final decree be entered in accordance with the rescript from the Supreme Judicial Court, directing John W. Estabrook, Fred W. Estabrook, Hervey W. Estabrook and the Marlborough Grain Company to pay James P. Steele, the plaintiff, the sum of $714.35 with interest and costs, and thereupon the plaintiff was to transfer his interest in the real estate to the defendant, Hervey W. Estabrook, free from any incumbrances made by the plaintiff Steele during the pendency of the proceedings. At the request of the parties the case was reported to the Supreme Judicial Court upon the supplemental bill, so called, the answer, replication, findings of fact, decree and appeals therefrom, and the order for a final decree after rescript.

The mortgagees acquired the plaintiff's title while the suit was pending, and the interest of the plaintiff in this real estate was involved in the suit. *Steele* v. *Estabrook*, *supra*, page 442. The doctrine of *lis pendens* as generally understood follows from the principle that the court has control over the subject matter of the litigation, while the suit or action is pending; "he, who purchases during the pendency of the suit, is bound by the decree, that may be made against the person, from whom he derives title. The liti-

gating parties are exempted from the necessity of taking any notice of a title, so acquired. As to them, it is as if no such title existed. Otherwise, suits would be indeterminable: or, which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined." *Bishop of Winchester* v. *Paine*, 11 Ves. 194, 197. *Long* v. *Richards*, 170 Mass. 120.

Under R. L. c. 134, § 12, with exceptions not now material, proceedings at law or equity, affecting the title to real estate, are not effective except against the parties thereto, their heirs and devisees and persons having actual notice thereof, until a memorandum of the proceedings is recorded in the registry of deeds. No notice of the pending suit, as required by the statute, was recorded in the registry of deeds; but the mortgagees were the plaintiff's counsel, the bill in equity was filed in March, 1914, and the real estate was conveyed to them in July, 1916. This property was described in the first paragraph of the plaintiff's bill; in the second prayer for relief he asked that an account be taken on the ground that the defendants had wrongfully appropriated this particular real estate, and that the defendants be ordered to pay him for the value of his interest in the property, on the ground stated. See *Steele* v. *Estabrook*, *supra*, page 442. The mortgagees were acting as counsel for the plaintiff when the conveyance was made. It is clear that as such they had actual notice of the proceedings and that the plaintiff's title to the real estate in question was involved in the suit within the meaning of R. L. c. 134, § 12. See *Wenz* v. *Pastene*, 209 Mass. 359; *Hughes* v. *Williams*, 218 Mass. 448, 451. The mortgage, therefore, was not valid against the defendants.

The mortgagees contend that, even if they cannot claim title to the real estate under their mortgage, the proposed decree should be modified so that the money payable to their client, the plaintiff, should be ordered to be paid to them. The report of the case does not show that the question of the validity of the mortgage between the parties to the instrument was passed upon, and it does not appear that the value of the mortgagee's services was determined. Under these circumstances the decree as ordered should not be modified. The decree entered upon the supplemental bill ordering the mortgagees to discharge the mortgage, and the order for the final decree, are affirmed.

The appeal of John J. Shaughnessy and Daniel W. Steele from the decree in the so called supplemental bill is dismissed.

So ordered.

GEORGE R. FIELD *vs.* IDA F. FIELD.

Middlesex. May 17, 1920. — June 24, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Marriage and Divorce. Husband and Wife. Superior Court. Jurisdiction. Domicil. Words, "Lived together."

A husband and wife after their marriage in this Commonwealth resided for three weeks in another State where the husband had his domicil and then came to a city in this Commonwealth where they remained for five weeks, during which the husband "worked in . . . [a] restaurant," thinking that he might settle in that city if he liked the conditions but never forming a definite intention to remain there. Thereafter they returned to the first State, where they lived until, over seven years later, the wife deserted the husband. Less than five years later, the husband brought a libel for divorce in this Commonwealth. *Held,* that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life.

A man with a domicil in the State of Rhode Island, who comes to a city in Massachusetts, does not lose his domicil in Rhode Island and acquire one in Massachusetts until he has a definite and fixed intention to remain in and to become a resident of this Commonwealth.

LIBEL FOR DIVORCE, filed on August 28, 1919, alleging a marriage in Providence in the State of Rhode Island on February 1, 1908, and that thereafter the libellant and the libellee lived together in this Commonwealth at Fall River and Boston, and charging desertion by the libellee.

The libel was heard by *Hammond,* J. Material facts found by him are described in the opinion. He ruled that the parties never had lived together in this Commonwealth as husband and wife within the meaning of R. L. c. 152, § 4, and that the court had no

jurisdiction to entertain the libel, and reported the case to this court for determination, the libel to be dismissed if the ruling was right, and, if the ruling was wrong, a decree of divorce *nisi* to be entered.

The case was submitted on briefs.

J. E. Crowley, for the libellant.

No counsel appeared for the libellee.

CARROLL, J. The parties were married on February 1, 1908, in Fall River, where the wife was living, the husband at that time residing in Providence, in the State of Rhode Island, and being engaged there in business. After a wedding journey to Lowell they lived in Providence for about three weeks. In March or April, 1908, they went to Lowell and remained there five weeks, during which time the libellant "worked in . . . [a] restaurant." They then returned to Providence where they lived until November, 1915, when the libellee deserted the libellant. The husband continued to live in Providence for six months after the desertion, and in 1916 came to Waltham in this Commonwealth, where he has since resided.

The judge found that when the libellant and his wife went to Lowell, in March or April, he "thought that he might settle in Lowell if he liked the conditions, but that he never formed a definite intention to remain there;" that his going to Lowell did not work a change in his domicil, and it continued to be in Providence from the date of the marriage until he removed to Waltham. The libellant had not lived in this Commonwealth for "five years last preceding the filing of the libel" (R. L. c. 152, § 5), and the court had no jurisdiction to grant the libel if the libellant and the libellee had never lived together as husband and wife in this Commonwealth. R. L. c. 152, § 4. The provision in the statute that the parties must have lived together as husband and wife in this Commonwealth in order that a decree of divorce may be granted, means, that they had a domicil here. *Ross* v. *Ross*, 103 Mass. 575. *Weston* v. *Weston*, 143 Mass. 274. When the parties went to Lowell in March or April, 1908, the husband did not intend to make his permanent home in that city, — his stay depended upon circumstances. If conditions were favorable he might continue to live there; but he had no definite and fixed intention to remain and become a resident of that city and he did

not acquire a domicil in this Commonwealth. "A person cannot be said to lose a domicil or residence by leaving it with an uncertain, indefinite, half formed purpose to take up his residence elsewhere. . . . Until his purpose to remain has become fixed, he could not be said to have abandoned his former residence." *Worcester* v. *Wilbraham*, 13 Gray, 586, 590. *Olivieri* v. *Atkinson*, 168 Mass. 28. *White* v. *Stowell*, 229 Mass. 594.

Winans v. *Winans*, 205 Mass. 388, on which the libellant relies, is clearly distinguishable. In that case, when the libellee came to Boston with his wife he intended to reside permanently in this Commonwealth.

The ruling in the case at bar that the parties had never lived together in this Commonwealth as husband and wife within the meaning of R. L. c. 152, § 4, and that the court had no jurisdiction to entertain the libel, on the facts found was fully warranted, if not required.

Libel dismissed.

EVERETT C. BROWN *vs.* INHABITANTS OF EDGARTOWN.
LUELLA NORTON *vs.* SAME.

Suffolk. May 17, 1920. — June 30, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Malicious Prosecution. Municipal Corporations, Officers and agents, Liability in tort. *Abuse of Process. Conspiracy. Actionable Tort.*

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect.

TWO ACTIONS OF TORT, the declaration, as amended, containing counts, described in the opinion, respectively charging malicious prosecution, abuse of legal process and conspiracy by unlawful means to cause the plaintiffs to leave the defendant town. Writs dated March 3, 1919.

In the Superior Court the defendant demurred to the declaration as amended. The demurrers were heard by *Hammond*, J., and were sustained. Thereafter judgments were entered for the defendant; and the plaintiffs appealed.

The cases were submitted on briefs.

J. L. Sheehan & F. W. Miller, Jr., for the plaintiffs.

F. Rackemann, B. T. Hillman & R. W. Dunbar, for the defendant.

PIERCE, J. These two actions were heard together, and in each a demurrer was sustained to the amended counts of the declarations. After entry of final judgments the cases are before this court on appeal.

The question presented is whether a Massachusetts town which has authorized by vote its servants, agents and officers, or has ratified by vote the acts of its servants, agents and officers, may be held liable in an action of tort for malicious prosecution, abuse of legal process, or conspiracy, for the damages sustained by a person or persons injured thereby, when such actions or either of them was authorized or ratified by the town for the purpose of forcing such person or persons to leave the town where they had an established business.

The demurrer admits that the town with malice and without reasonable and probable cause, authorized or subsequently ratified the acts of its servants, agents and officers whereby the plaintiffs were charged in the District Court of the County of Dukes County with the crimes of drunkenness and larceny. It also admits that the plaintiffs were arrested following the complaints, that they gave bail, and that they were tried and were discharged on the complaints after a full hearing.

It was said in *Thayer* v. *Boston*, 19 Pick. 511, at page 515, by Chief Justice Shaw: "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was

done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done." In this Commonwealth a town in its corporate capacity will not be bound, by express vote or by subsequent ratification, to the performance of contracts or to answer in damages for the torts of its servants and agents where the acts and duties were in their nature unlawful or prohibited, or were wholly beyond the powers of the town as not coming within the scope of the objects and purposes for which it was incorporated. *Anthony* v. *Adams*, 1 Met. 284.

A town in Massachusetts never had a common law or statutory right to "warn out" and expel persons merely because such persons were undesired, through persecution, using as instruments thereof criminal conspiracy, abuse of civil process, and false and unfounded complaints to the court. As a matter of law, the absence of such power and the consequent illegality and utter inefficacy of a vote passed for such purpose must have been known and understood at the time the vote was passed authorizing or ratifying the acts done or to be done. *Cavanagh* v. *Boston*, 139 Mass. 426. *McCarthy* v. *Boston*, 135 Mass. 197. *Lemon* v. *Newton*, 134 Mass. 476. See, in this connection, *Buttrick* v. *Lowell*, 1 Allen, 172; *Bolster* v. *Lawrence*, 225 Mass. 387.

Judgment affirmed.

SELECTMEN OF BROOKLINE, petitioners.

Norfolk. May 17, 1920. — July 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Grade Crossing. Railroad. Statute. Damages, Apportionment of expense of rebuilding bridge over railroad. *Constitutional Law*, Obligation of contracts, Police power, Public service corporations.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, by broadening and extending their provisions so that, where previously they related only to the construction, maintenance and repair of highway bridges over railroad locations, after the amendment they applied to cases where there was need of the "rebuilding of a highway bridge or any structural change or renewal for the purpose of

strengthening or improving it," while it could have no retroactive effect as to vested rights, conferred an authority coextensive with the statute which it amended, which thereafter must be read as if it originally had been in the amended form, and neither the provisions of the amending statute nor those of the statute as amended are restricted to railroad crossings altered after the amendment.

Upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, after their amendment by St. 1908, c. 542, a highway bridge in a town, which had been built over a railroad in accordance with a decree following proceedings under Pub. Sts. c. 112, §§ 131, 132, ordering that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair," may be ordered to be rebuilt and a part of the expense of such rebuilding may be assessed upon the railroad.

The provisions of St. 1908, c. 552, are not inconsistent with those of St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542.

A railroad corporation is a creature of the Commonwealth engaged in the doing of a public business and is bound by any reasonable statutes for the regulation of this business which the Legislature chooses to enact.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution.

A part of the expense of rebuilding a highway bridge over a railroad or of making any structural change or renewal for the purpose of strengthening or improving it upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, may be assessed upon the railroad corporation although it receives no benefit therefrom.

It could not be ruled as a matter of law, at the trial of an application under St. 1906, c. 463, Part I, § 27, for a revision of a report of a special commission relative to the rebuilding of a highway bridge, previously constructed over a railroad in the town of Brookline, that the railroad corporation received no benefit from such rebuilding, because thereby there was furnished at a crossing over the railroad a bridge more substantial and safe than the previous bridge and thus possible delay and damage which might be incident to a defect in the previous bridge were prevented.

In the proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, above described, which were new proceedings, the intent and understanding of the parties to the proceedings under Pub. Sts. c. 112, §§ 131, 132, which resulted in the construction of the original bridge, were *held* to be immaterial.

Where, after a decree of county commissioners that a highway bridge over a railroad in a town should be rebuilt, the town carried the decree into effect "by agreement of all parties . . . and . . . paid the charges and expense of rebuilding" previous to a decree in proceedings instituted by it under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, the railroad company, at the trial of an application under § 27 of the amended statute for a jury to revise the report of the special commission appointed under the amended §§ 23, 25, is entitled to a ruling that it need not pay to the town interest upon that part of the amount so expended by the town which afterwards was apportioned to be paid by the railroad company.

TWO PETITIONS, filed in the Superior Court on April 6, 1916, under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908,

c. 542, §§ 1, 2, for the appointment of special commissions to determine questions relative to the rebuilding of bridges over the Boston and Albany railroad at Cypress Street and at Aspinwall Avenue in Brookline under decrees of the county commissioners of Norfolk County entered on February 1, 1916.

Commissions were appointed and filed reports, which are described in the opinion. Thereafter the Boston and Albany Railroad Company and the New York Central Railroad Company applied, under St. 1906, c. 463, Part I, § 27, for revision of the reports of the special commissions. The applications were tried together before *Keating*, J. Material evidence, the substance of requests of the railroad companies for rulings and instructions, and the special findings of the jury are described in the opinion. The judge under St. 1913, c. 716, reported the cases to this court for determination, stating that he did so "upon the following terms and conditions which shall apply to each case: If upon all the evidence my rulings and instructions were correct, a decree shall be entered for the petitioners in accordance with the jury's special findings; if my rulings or instructions were wrong, a decree shall be entered in accordance with such rulings as I ought to have made, if the court is satisfied that it has before it all the facts necessary for determining the questions in dispute. If the court shall be of the opinion that it has not before it sufficient facts to determine said questions, the case shall stand for such further hearing as shall accord with the determination of the court."

St. 1908, c. 542, approved May 26, 1908, amending St. 1906, c. 463, Part I, §§ 23, 25, reads as follows:

"Section 1. Section twenty-three of Part I of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six is hereby amended by inserting after the word 'board,' in the seventeenth line, the words: — This proceeding may include any case where there is need of the rebuilding of a highway bridge or any structural change or renewal for the purpose of strengthening or improving it, — and by inserting after the word 'building,' in the twentieth line, the words: — rebuilding, changing, renewing, — so as to read as follows: — Section 23. If a public way and a railroad cross each other, and the board of aldermen of the city or the selectmen of the town in which the crossing is situated, or the directors of the railroad corporation, or the directors of a street

railway company having tracks on the said way are of opinion that it is necessary for the security or convenience of the public that an alteration which does not involve the abolition of a crossing at grade should be made in the crossing, the approaches thereto, the location of the railroad or way, or in a bridge at the crossing, they shall apply to the county commissioners, or, if the crossing is situated in the city of Boston, to the board of railroad commissioners, who shall, after public notice, hear all parties interested, and, if they decide that such alteration is necessary, shall prescribe the manner and limits within which it shall be made, and shall forthwith certify their decision to the parties and to said board. This proceeding may include any case where there is need of the rebuilding of a highway bridge or any structural change or renewal for the purpose of strengthening or improving it. In case any street railway company is authorized to lay and use tracks upon the said way, the said company shall bear such part of the expense of building, rebuilding, changing, renewing, repairing or improving a bridge forming a part of said way, or of altering or improving the approaches thereto, as shall be deemed to be just by the commission provided for in sections twenty-five and twenty-six.

"Section 2. Section twenty-five of Part I of said chapter is hereby amended by inserting after the word 'such,' in the sixth line, the words: — bridge or, — and by inserting after the word 'such,' in the twenty-first line, the words: — bridge or crossing and, — so as to read as follows: — Section 25. A special commission of three disinterested persons, who shall be appointed as provided in the following section, shall determine which party shall carry such decision into effect and which party shall pay the charges and expenses of making such alteration and the future charges for keeping such bridge or crossing and the approaches thereto in repair, as well as the costs of the application to the county commissioners, or the board of railroad commissioners, and of the hearing before said special commission; and it may apportion all such charges, expenses and costs between the railroad corporation, the street railway company having tracks on said way, and the counties, cities or towns in which said crossing is situated and other cities and towns which may be specially benefited. If a street railway company is authorized to lay and use tracks upon any bridge in a highway which is built or repaired or altered as

above provided for, or the approaches to which are altered or improved as above provided for, the said commission shall determine what part of the charges and expenses of making such changes or improvements, or of keeping such bridge or crossing and approaches in good condition, shall be paid by the said street railway company."

St. 1908, c. 552, approved May 27, 1908, reads as follows:

"Section 1. If the county commissioners of a county, the board of aldermen of a city or the selectmen of a town in which a bridge at the crossing of a public way and a railroad, or a bridge upon which a street railway company is authorized to lay and use tracks, is located in whole or in part, or the directors of a corporation owning or operating such railroad, or the directors of a company owning or operating such street railway, are of the opinion that such bridge is in need of maintenance or repair, they may apply to the board of railroad commissioners who shall, after public notice, hear all persons interested, and, if they decide that the work of maintenance or repair is necessary, shall prescribe the manner in and the limits within which it shall be done, and shall forthwith certify their decisions to the parties.

"Section 2. If railroad corporations, street railway companies, counties, cities, towns, or any of them, jointly or severally, are charged with the duty of maintaining or repairing any such bridge under any provision of law, agreement, or decree of court, and if the party or parties so charged with such duty refuse or neglect to carry into effect such decision within a reasonable time, any other such party may apply to the Superior Court, which shall have jurisdiction in equity to enforce the carrying into effect of such decision by the party or parties so charged with such duty.

"Section 3. This act shall take effect upon its passage."

The cases were submitted on briefs.

W. D. Turner & G. Hoague, for the petitioners.

R. A. Stewart & E. H. Abbot, Jr., for the respondents.

JENNEY, J. These cases, as stated in the report under which they are before the court, are "two applications [under St. 1906, c. 463, Part I, § 27] of the Boston and Albany Railroad Company and the New York Central Railroad Company, Lessee, [hereinafter referred to as the railroad] for a jury to revise the reports and awards of two Special Commissions both appointed . . . October

17, 1916, one to hear and determine which party should pay the charges and expenses incident to the execution of certain work ordered by the County Commissioners of Norfolk County under date of February 1, 1916, upon the bridge at Cypress Street in Brookline over the Boston and Albany Railroad; and the other to hear and determine which party should pay the charges and expenses incident to the execution of certain work ordered by the County Commissioners of said county under date of February 1, 1916, upon the bridge at Aspinwall Avenue in Brookline over the Boston and Albany Railroad."

Cypress Street, where it crossed the railroad, was a public way prior to 1851. In that year the Charles River Branch Railroad, "a corporation which was afterwards acquired by the Boston and Albany Railroad Company," was granted a location which crossed the street at grade, and the railroad was constructed thereover. On July 3, 1888, the commissioners in substance adjudged that it was necessary for the security and convenience of the public to erect a bridge over the railroad, which then was a part of the system owned and operated by the Boston and Albany Railroad Company, at the point where the street crossed it at grade; and the details of the construction of the bridge and its approaches were determined. On September 12, 1888, special commissioners were appointed under the provisions of Pub. Sts. c. 112, §§ 131, 132, and acts in amendment thereof, who, after hearing, directed that the railroad should build the bridge, abutments and superstructure, and should bear the cost of that work; that the town of Brookline should do all other work required by the order; and that the company should pay to the town a specified sum of money and a part of the cost of certain parts of the work. The commissioners further reported that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair." The town of Brookline applied for a trial by jury, and, as a result of the trial, the answers to the issues submitted confirmed in effect the report of the commissioners, except that the amount to be paid to the town by the railroad was increased. On July 2, 1890, a decree was entered in accordance with the report of the commissioners, as modified by the findings of the jury. This decree provided: "Said town shall bear all future charges for keeping said bridge and the approaches thereto in repair." In the year 1913 the officers of

the railroad became satisfied that the bridge needed repairs and reported that fact to the officers of the town.

The "Charles River Branch Railroad Company, (whose successor is the Boston and Albany Railroad Company,) acquired its location now known as the Newton Highlands Branch," and prior to 1855 operated trains thereover. In 1855 the highway now called Aspinwall Avenue had not been laid out nor constructed to or near the railroad location. In 1857 a petition was filed with said commissioners requesting that a new highway be constructed with a crossing over said railroad location, and on January 11, 1857, the commissioners adjudged and determined that public convenience and necessity required that a highway be laid out with an "overpass bridge at the railroad crossing." Thereafter they located said road and bridge, and directed that a bridge be constructed over said railroad "of a width and space specified," and that the town of Brookline should construct the same at its sole expense. This decree was complied with. In 1888 the selectmen petitioned the county commissioners asking them to order that this bridge be widened to the full width of said avenue; and, after hearing, the commissioners in substance ordered that it was necessary for the security and convenience of the public that alterations be made in the bridge, and prescribed in detail its width and the construction. On April 7, 1893, the Boston and Albany Railroad Company granted to the town an easement permitting the construction and maintenance of abutments and wing-walls of said bridge upon certain land owned by it. On March 29, 1893, the selectmen of the town, in a petition to the Superior Court, recited the entry of the decree of the county commissioners, and prayed for the appointment of a special commission. This commission was duly appointed. Said commissioners on March 31, 1893, ordered "in conformity with the agreement of the parties" that the alterations in the bridge and the approaches thereto should be made by the town; that the county of Norfolk should pay a part of the expenses; and that "the town of Brookline . . . pay the rest, and . . . keep the said bridge and the approaches thereto in repair, the Boston and Albany Railroad Company having waived all claim for land, grade and other damages to arise from said alterations." On April 18, 1893, by consent of all parties a decree was entered in the Superior Court confirming this award. The bridge as thus altered

was kept in repair thereafter by the town, and was used by the public for many years. In 1914 the railroad officials reported to the officers of the town that the bridge was not in good repair.

The selectmen of Brookline, in 1915, petitioned the county commissioners, reciting that it was no longer practicable to make these bridges safe by repairs, and that it was necessary to rebuild the same for the security and convenience of the public, and requested them, if they should determine that such rebuilding was necessary, to prescribe the manner and limits thereof. After hearing, the commissioners adjudged in each proceeding "that it . . . [was] necessary for the security and convenience of the public that the highway bridge . . . be rebuilt," and prescribed the manner and limits of the work. The new bridges provided by the decrees were of the same width as the old bridges, but it was required that the iron and steel superstructure be encased in reinforced concrete, the roadway, which in the old bridge was of hard pine under floor and a spruce plank wearing surface, be paved with wood blocks, and that sidewalks be constructed of concrete slabs with heavy granolithic surfaces with chambers for gas and water pipes.

Thereafter petitions were filed in the Superior Court for the appointment of special commissioners, to determine who should carry the decisions into effect, and who should pay the charges and expenses incurred by reason thereof, the future charges for keeping the bridge in repair, and the costs of the application and of the hearings. Commissioners having been appointed, they reported to that court that the town of Brookline had properly carried into effect, by agreement of all parties, the orders of the county commissioners, and had paid the charges and expense of rebuilding the superstructure of the bridges. The bridges as now constructed, being of reinforced concrete, are stronger than those which they replaced, will carry heavier loads, and will have a very much longer life. The commissioners determined that the railroad and the town of Brookline should pay all charges and expense of rebuilding the superstructure of the Cypress Street bridge; and that, of the amount paid by the town, the railroad should pay $4,000 with interest at the rate of three per cent per annum from March 28, 1916, and the town the remainder. The commissioners determined that the expense of reconstruction of the Aspinwall Avenue bridge should be borne by the railroad and by the town. They appor-

tioned $750 of the expense thereof upon the former with interest at the rate of three per cent per annum from March 28, 1916, and substantially $7,421.87, the balance of charges and expenses of rebuilding the superstructure, upon the town. They further reported, concerning the Cypress Street bridge, that the town should "pay the future charges for keeping said bridge and approaches thereto in repair intending herein to include the expense of keeping the surface of the roadway in condition suitable for travel, together with the expense of keeping the new superstructure in repair, and apportion said charges upon the inhabitants of the town of Brookline, not intending, however, to impose upon them the entire cost of rebuilding said structure should a rebuilding thereof become necessary through its destruction by consent of the authorities and parties hereto or by some other act or by lapse of time;" and concerning the Aspinwall Avenue bridge, that said town should "pay the future charges for keeping said bridge and the approaches thereto in repair intending . . . to include the expense of keeping the surface of the roadway in condition suitable for travel, together with the expense of keeping the new superstructure in repair." They also apportioned the payment of costs of applications to the county commissioners and of hearings before the special commissioners.

The applications for jury now under consideration were tried together, and the jury made special findings which, in effect, affirmed the orders of the special commissioners except as to interest, concerning which the jury included interest at the rate of four per cent per annum instead of three per cent, as determined by the special commissioners. The report presents for decision the correctness of the rulings of the trial judge.

The underlying questions presented by the record and argued by the excepting respondents are twofold: those relating to the contention that the decrees, hereinbefore summarized, required the town to "repair and maintain and if necessary to replace the superstructure of each bridge without expense to the respondents;" and those arising under the contention that "aside from the obligation imposed upon the town by the former orders and decrees, the respondents as matter of law were not benefited by the work done upon either bridge . . . and therefore no part of the expense of such work can lawfully be assessed against them."

It is assumed, but not decided, that under the decrees entered in 1890 and 1893, there was imposed on the town the duty of maintaining and of keeping in repair the bridges constructed thereunder, and that if the necessity had arisen for their replacement, the burden of so doing would have been upon the town, apart from the proceedings instituted in 1915 which are now under consideration.

Previous to St. 1908, c. 542, § 1, amending St. 1906, c. 463, Part I, § 23, the statutory provisions relating to the construction, maintenance and repair of bridges, where highways are carried over railroad locations, did not in terms apply to cases where there was need of the "rebuilding of a highway bridge or any structural change or renewal for the purpose of strengthening or improving it;" but by that statute, it was provided that provisions, relating to alterations in public ways where they cross railroads and where an abolition of a crossing at grade is not involved, should apply to such rebuilding, change or renewal. It is urged that this statute does not affect bridges in existence at the time of its enactment, but no such limitation is found therein. Its provisions were inserted in St. 1906, c. 463, Part I, § 23, by way of amendment purporting to broaden proceedings therein authorized. While it could have no retroactive effect as to vested rights (*See* v. *Kolodny*, 227 Mass. 446, 449), it is clear that its authority was coextensive with the statute which it amended, which must be "read as if it had originally been in the amended form." *Blair* v. *Chicago*, 201 U. S. 400, 475. It was not an independent provision, but became a part of a statute giving broad authority as to alterations in crossings not at grade. The statute so amended clearly was not restricted to alterations in crossings of that nature thereafter coming into existence. Neither can the amendment be so limited. *Boston, petitioner*, 221 Mass. 468, 477, 478.

The amending statute was approved on May 26, 1908, and on the next day St. 1908, c. 552, was also approved. It is argued that the first statute cannot be considered as applying to bridges in existence at the time of its passage and constructed under previously existing provisions of law, agreements or decrees, because the later statute provided for the enforcement of obligations so created. This argument cannot prevail, however, because these independent statutes are consistent if the second is construed as relating to the

enforcement of obligations which are not modified nor terminated by some legal means.

The respondents further contend that if St. 1908, c. 542, should be held to be retroactive, it is for that reason unconstitutional. It requires no general citation of authority to maintain the proposition that the Legislature cannot recall, set aside, or reopen the decrees under which these bridges were built. *Opinion of the Justices*, 234 Mass. 612. The statute under consideration, however, does not do this. It proceeds on the basis that where a replacement or structural change or renewal is required, new proceedings are necessary. It is urged that this statute cannot control, the respondents contending that "When the railroad complied with those decrees it acquired a contractual right to require the town to perform the obligation to repair (and so to rebuild) the bridges as then constructed."

The fundamental concept involved in this question is so well and clearly settled that it is unnecessary to discuss the reasons therefor. In *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180, 188, it was said: "The construction of a railroad is not a private enterprise. The corporation exercises the right, or the Legislature through the corporation exercises the right, to take private property for the road, on the ground that the use is a public use and the road itself a highway for the public travel. On no other ground could the exercise of the right of eminent domain by or through these corporations be upheld. The Legislature has in this view and to this end reserved to itself full power to amend or alter the charters of the railroad companies and regulate the exercise of powers under them." See St. 1849, c. 170, incorporating the Charles River Branch Railroad Company.

St. 1890, c. 428, (now embodied in St. 1906, c. 463, Part I, §§ 29 *et seq.*,) first provided for the payment of the costs of the abolition of crossings at grade by the municipality, railroad company and the Commonwealth in proportions fixed "without reference to the value of the property owned by them respectively, and without reference to the benefits which they severally receive in any particular case" (*Selectmen of Norwood* v. *New York & New England Railroad*, 161 Mass. 259, 264); and in proceedings based on findings that the "security and convenience of the public" required a change in the crossing, in *Selectmen of Norwood* v. *New York & New*

England Railroad, supra, at page 264, speaking with reference to the constitutionality of this statute, it was declared, with full citation of authorities: "It would have been in the power of the Legislature in granting charters to railroad corporations to provide that the railroad should not be constructed across a public highway without carrying the highway over or under the railroad, and that all the expenses of changing the grade of the way and constructing the approaches to the railroad should be borne by the railroad corporation. If, by an increase in the amount of travel at a grade crossing, or of the number of trains running over the railroad, or by changes in the manner of running trains, or of the modes of travel on a highway, or if by reason of any other change of circumstances the Legislature should deem it best for the public interest that a grade crossing should be abolished, it would be within the constitutional authority of the Legislature to forbid the continuance of it, and to require the railroad company to pay the whole, or any part, of the cost of making the change. . . . This it might do in the exercise of the police power for the protection of the people, and its decision in regard to what is right and proper in each particular case, or in any class of cases, would not be subject to revision by any other tribunal. This would not be taking from the railroad company its property or any vested right. It would be merely prescribing in the interest of the public the mode of constructing its road. Of the power to prescribe such regulations for railroad corporations, there can be no doubt. These corporations are creatures of the State engaged in doing a public business, and are bound by any reasonable statutes for the regulation of this business which the Legislature chooses to enact." In *In re Mayor & Aldermen of Northampton, petitioner,* 158 Mass. 299, 302, it is said: "As the whole subject of the crossing of highways by railroads can from time to time be regulated by the Legislature, the Legislature can, even after a final decree has been rendered, make other provisions, and require the crossings to be constructed in a manner different from that established by the decree." The same principles were fully and clearly set forth in *Boston, petitioner, supra,* where the bridge was over tidal waters, and municipal rights only were in question. The situation in such cases is analogous to that of public corporations where statutes much more drastic than that in question have been upheld. See *Opinion of the Justices, supra.*

See also *Sawyer* v. *Davis*, 136 Mass. 239, 245; *Brownell* v. *Old Colony Railroad*, 164 Mass. 29; *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 183 Mass. 535; *County Commissioners, petitioners*, 193 Mass. 257.

The decisions of the United States Supreme Court are to the same effect. In *New York & New England Railroad* v. *Bristol*, 151 U. S. 556, 571, it is stated: "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious." See also *Munn* v. *Illinois*, 94 U. S. 113, 126; *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U.S. 155, 161; *Chicago, Burlington & Quincy Railroad* v. *Nebraska*, 170 U. S. 57, 73; *Chicago, Burlington & Quincy Railway* v. *Drainage Commissioners*, 200 U. S. 561; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583; *Chicago & Alton Railroad* v. *Tranbarger*, 238 U. S. 67, 78; *Chattanooga* v. *Southern Railway*, 128 Tenn. 399; *Bacon* v. *Boston & Maine Railroad*, 83 Vt. 421. The cases on which the respondents rely, (*Steamship Co.* v. *Joliffe*, 2 Wall. 450, *Nelson* v. *St. Martin's Parish*, 111 U. S. 716, *Grand Trunk Western Railway* v. *South Bend*, 227 U. S. 544, *Commonwealth* v. *Essex Co.* 13 Gray, 239,) do not modify nor control these well settled principles. It follows that St. 1908, c. 542, was not obnoxious to the provisions of either the State or Federal Constitution.

The respondents further contend that no decree can be entered

directing payment by them of any part of the cost of rebuilding these bridges because they received no benefit therefrom. This objection is not tenable. The statute does not provide that assessments under its terms must be measured by the benefit received. St. 1906, c. 463, Part I, § 25, under which the special commissioners acted, required them to determine which party should carry their decision into effect, and which should pay the charges and expenses of any alterations ordered and the future charges for keeping the bridge and approaches thereto in repair as well as the costs of application to the county commissioners and of hearings before them. They are further required to "apportion all such charges, expenses and costs between the railroad corporation, . . . the counties, cities or towns in which said crossing is situated and other cities and towns which may be specially benefited." The provision as to special benefits does not relate to the railroad, or indeed to the city or town in which the crossing is situated, but only to other cities and towns. This clearly appears from the history of the statute as well as from its grammatical construction. See Pub. Sts. c. 112, § 131; St. 1885, c. 194, § 4; St. 1887, c. 295, § 1. It never has been held that the amount apportioned to be paid by municipalities or railroad companies was necessarily based upon or limited by special benefits caused by an alteration of a grade crossing. *Selectmen of Norwood* v. *New York & New England Railroad, supra*, is an authority to the contrary. It was said in *Boston & Lowell Railroad* v. *Winchester*, 156 Mass. 217, 220: "It follows that the judge who is called upon to preside at such a trial does his whole duty when he allows the jury to hear all the pertinent competent evidence upon the questions under investigation, and instructs them upon such principles of right and justice, having a legitimate bearing upon the subject, as either party may desire him to call to their attention. It is not essential for him to lay down any specific rule of award or apportionment as governing the case, because the Legislature has seen fit not to order any apportionment or award upon any prescribed rule or theory. He may well leave the decision where the Legislature has left it, to the good sense and sound discretion of the jury itself. But he does not commit error if he sees fit to instruct them that they should bear in mind and apply any principle which must be recognized as fair and just, and applicable to the circumstances of the case in hand." Under this com-

prehensive rule it was there held that it was proper to instruct the jury that they should consider "one general rule, that the parties should pay for the benefits respectively received" with the further instruction that together the parties "must bear the whole cost." If amounts apportioned were based solely on special benefits received, it might well result that the benefits to all concerned would not equal the cost of the alteration necessary for the security or convenience of the public. See also *Kingman, petitioner*, 153 Mass. 566; *Opinion of the Justices, supra*. *Directors of the Boston & Maine Railroad, petitioners*, 232 Mass. 171, is not in conflict with this rule.

Moreover, it cannot be ruled as matter of law that no benefit accrued to the railroad from these changes which provided a more substantial and safe bridge over its tracks, and thus possibly prevented delay and damage which might be incident to a defect in the bridge.

The rulings requested as to the intent and understanding of the parties in 1890 were immaterial, because those decrees were not a bar to the proceedings here in controversy. In the Aspinwall Avenue bridge case, the court in effect gave the respondents' first request for rulings. The second and third requests in that case, if given, would have required the jury to pass upon all the facts found by the commissioners where in truth only those involved in special issues were in question.

The part of the charge as to the previous decrees relating to the keeping of the former bridge in repair and the expense of rebuilding the same, even if incorrect, did not injuriously affect the substantial rights of the respondents. As has been stated, under St. 1908, c. 542, the county commissioners had a right to order the construction of new bridges, and the special commissioners were authorized to apportion a part of the costs thereof on the railroad as a new proceeding unaffected by the construction of earlier decrees. On the application of the railroad for a jury to revise and determine matters of fact found by the commissioners, the effect of the old decrees was not in issue. Moreover, in connection with this exception, counsel for the railroad stated that the exception was taken "only to tie it up with . . . [his] request to the effect that as a matter of law you should instruct them that there could be nothing placed upon the railroad company."

This leaves for consideration the exceptions relating to the right of the town to interest on the amount which has been apportioned upon the railroad. Interest is not now claimed under St. 1906, c. 463, Part I, § 28, where it is provided that any amount apportioned under the statute shall bear interest after the award takes effect. The railroad is not liable to pay interest except under this statute. The voluntary act of the town in doing the work under the agreement hereinbefore stated, prior to the entry of the decrees, was not the equivalent of an obligation imposed upon it so to do, and does not bring the case within the reason of *County Commissioners, petitioners*, 143 Mass. 424. The question involved is settled adversely to the contention of the town by *Old Colony Railroad, petitioner*, 185 Mass. 160, and *County Commissioners, petitioners*, 193 Mass. 257. The jury should have been instructed as requested by the respondents, that the town was not entitled to interest on the amount expended by it, thereafter apportioned upon the railroad. This does not render a new trial necessary. Under St. 1913, c. 716, § 2, and under the terms of the report, the cases are in readiness for final decree. The exceptions must be overruled, except those relating to the payment of interest, which are sustained.

So ordered.

OSMOND W. BRALEY, administrator, *vs.* MASSACHUSETTS NORTHEASTERN STREET RAILWAY COMPANY.

SAME *vs.* COUNTY OF ESSEX.

Essex. May 17, 1920. — July 6, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Way, Public: defect in bridge. *Municipal Corporations. Street Railway. Evidence*, Competency.

At the trial of two actions of tort under R. L. c. 51, § 17, by an administrator respectively against a street railway company and the county of Essex, for causing the death of the plaintiff's intestate at a draw in Plum Island bridge, there was evidence showing the following facts: The bridge runs east and west and was enclosed on each side by a fence. The mechanism of the draw was such that, as it opened, its side fence came squarely across the roadway and effectually blocked entrance to the draw from the east, the opening for the pas-

sage of vessels thus being made west of the draw. It took from twelve to fifteen seconds to open the draw, and, during the process, there was an opening, gradually decreasing, from the bridge on the east to the draw. There was a gate fifty feet westerly from the draw, used to block approach from that direction while the draw was open. There had been a gate forty feet easterly of the draw, used for the same purpose, but it had been out of use for ten years and was fastened to the side fence by wire. The draw tender, an employee of the county, saw the plaintiff's intestate approaching from the east on a motorcycle at a rate of about forty miles an hour when the draw was about half open, his speed gradually decreasing as he approached. The draw tender tried to stop the further opening of the draw to give the intestate "the benefit of the length of the draw." The intestate ran upon the draw, struck a pole at the westerly end and was thrown and drowned. By statute and contract the defendant street railway company was required to keep the bridge in repair. *Held*, that

(1) There was no evidence that the bridge was defective;

(2) The county of Essex could not be held liable for negligence of the draw tender;

(3) The street railway company was not liable for the negligence of the draw tender, an employee of the county of Essex.

At the trial above described, evidence was not admissible to prove that, after the plaintiff's intestate was killed, the defendant street railway company erected new gates at both ends of the draw.

TWO ACTIONS OF TORT under R. L. c. 51, §§ 17, 18, for damages resulting from conscious suffering and the death of Harold L. Braley, alleged to have been caused by a defect and want of repair in Plum Island bridge. Writs dated May 26, 1917.

In the Superior Court the actions were tried together before *Lawton*, J. Material evidence is described in the opinion. At the close of the evidence, by order of the judge, the jury found for the defendant in each action; and the plaintiff alleged exceptions.

The cases were submitted on briefs.

F. H. Magison, for the plaintiff.

J. J. Ryan & J. P. Cleary, for the defendant street railway company.

N. N. Jones & P. I. Lawton, for the defendant county of Essex.

CARROLL, J. In these two actions, under R. L. c. 51, §§ 17, 18, the plaintiff seeks to recover damages for the death and conscious suffering of his intestate, Harold L. Braley who, while travelling on a motorcycle, went on to the partly open draw of the Plum Island bridge, and striking a pole at the farther or westerly end, was thrown about twelve feet against the opposite abutment and drowned. There was no evidence that the intestate consciously suffered.

Plum Island bridge was formerly owned and maintained by the Plum Island Turnpike and Bridge Corporation. It was laid out as a public highway by the county commissioners of the county of Essex under St. 1905, c. 404. St. 1915, c. 172, provided that the salary of the draw tender, the installation and repair of apparatus for operating the draw were included in the term "operating," which expense was to be borne by the county and by the municipalities specially benefited. By the contract of the bridge corporation and the Plum Island Electric Street Railway Company, referred to in St. 1905, c. 404, § 2, the bridge corporation had agreed to operate and tend the draw, furnishing the labor and superintendence needed therefor, and the street railway company agreed to keep the bridge in repair. By § 2 of the statute, the county commissioners of Essex County succeeded to "all the rights, powers, privileges, duties and obligations" of the bridge corporation in the contract. The Citizens' Electric Street Railway Company was given the same right to maintain and operate its tracks upon the bridge as the Plum Island Electric Street Railway Company possessed, as long as it performed the duties imposed on that company by the contract. It was agreed that the defendant the Massachusetts Northeastern Street Railway Company succeeded to all the rights and obligations of the Citizens' Electric Street Railway Company under that contract and St. 1905, c. 404, and St. 1915, c. 172.

There was evidence that the accident happened about four o'clock in the afternoon of "a nice day, pleasant weather." The bridge is seven hundred and thirty feet long, enclosed by a rail fence. The draw is about fifty or sixty feet long and about twenty feet wide. As it swings round, when fully open the fence on the side of the draw acts as a barrier to travel from the east, and west of it there is an open space for the passage of boats. On the bridge, about fifty feet westerly of the draw, there is a gate which was closed at the time of the accident; and another about forty feet easterly of the draw which was open. The record does not show when or by whom this gate on the easterly side of the bridge was built; but according to the testimony of the draw tender, who had been employed there for ten years, it had never been used during that period. It had been fastened by wire to the side of the bridge for seven or eight years, "was all

broken to pieces," and in such condition that it could not be used as a barrier. As the draw turns, one could pass from the unobstructed part of the approach on the east side, but, when fully opened, the fence on the side of the draw extended across the whole width of the way. On the day of the injury, the draw tender saw the intestate about eighty feet away, approaching from the east, when the draw had been opened about half the width of the roadway leaving part of it unprotected. He testified that the intestate was riding at the rate of forty miles an hour but the speed lessened as he reached the draw; that "it takes twelve to fifteen seconds to open it;" that he tried to stop the further opening of the draw, giving the intestate "the benefit of the length of the draw," and supposed he could stop the motorcycle in that distance.

In these circumstances it could not be said that the bridge was defective. When the draw was open, the fence on its side was itself a barrier to travel from the east; and although the gate forty feet distant from the draw was out of repair and was not in use, the bridge in our opinion was at the time reasonably safe for travel. The draw could be fully opened in from twelve to fifteen seconds, and during this operation travel on a part of the bridge was barred. It was only during this very short period of time that it was possible to go upon the draw, and the distance of fifty or sixty feet would have to be travelled before the open space on the westerly side would be reached. When the opening of the draw was completed, at the expiration of twelve or fifteen seconds, the fence on the draw as fully protected travel as the gate farther east could have done. Under St. 1905, c. 404, § 6, as amended by St. 1915, c. 172, and the contract referred to, the street railway company was required to keep the bridge in condition reasonably safe for travel. See *Wilson* v. *Boston*, 117 Mass. 509; *Mack* v. *Boston & Albany Railroad*, 164 Mass. 393. The fact that the approach to the draw was not fully protected, during the short interval, did not show as matter of law that the bridge was unsafe for travel, reasonably considered. The exercise of reasonable care and diligence did not require of the defendant street railway company, in order to make the bridge safe for ordinary travel or travel generally, that the gate east of the draw should be closed while the draw was turning and was in the act

of opening; and at this time it was not fairly to be anticipated that a traveller would attempt to pass from the permanent part of the bridge to the moving draw and continue to the westerly end where there was the open space for the passage of vessels.

Even if it could be found that the draw tender was negligent, which we do not mean to intimate, the county of Essex was not liable for his neglect. *Butterfield* v. *Boston*, 148 Mass. 544. *Hawes* v. *Milton*, 213 Mass. 446. And the Massachusetts Northeastern Street Railway Company could not be held for the negligence of a servant in the employment of the county of Essex.

The plaintiff offered evidence to show that, after his intestate was injured, the defendant street railway company erected new gates at both ends of the draw. Under the contract and St. 1905, c. 404, repairs were to be made in the first instance by the street railway company, and the company continued liable to perform this obligation until the work, by reason of its failure, was undertaken by the county of Essex. Under § 7 of the statute, if the street railway company failed to make repairs, the county of Essex could undertake that work. The evidence offered was not admissible to show negligence of the party responsible for the condition of the bridge. *Downey* v. *Sawyer*, 157 Mass. 418, 421, and cases cited. By the statutes and the contract referred to, that responsibility rested on the street railway company, and it was agreed that the defendant street railway company assumed all the duties of the Plum Island Street Railway Company in the care of the structure. In these circumstances, the evidence offered was not admissible under the rule established in *O'Malley* v. *Twenty-five Associates*, 170 Mass. 471, and similar cases where the fact that repairs were made after an accident was held to be admissible as an admission by the party making them that he recognized this duty belonged to him.

As there was no evidence of the defendant's negligence it is unnecessary to consider whether the plaintiff's intestate was in the exercise of due care.

Exceptions overruled.

ERNEST B. DANE *vs.* TREASURER AND RECEIVER GENERAL.

Suffolk. June 22, 1920. — July 7, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Constitutional Law, Taxation, Distribution of income tax, Equal protection of laws, Due process of law. *Tax*, On income.

Dane v. *Treasurer & Receiver General*, 234 Mass. 42, affirmed.

PETITION, filed on April 15, 1920, and afterwards amended, by a taxable inhabitant of the town of Brookline, for a writ of mandamus commanding the Treasurer and Receiver General "not to distribute or pay over any portion of the tax for the year 1920 raised under the provisions of St. 1916, c. 269, from the petitioner or from any other inhabitant of the town of Brookline to any other city or town until the further order of the court."

The respondent demurred. The case came on to be heard before *Rugg*, C. J., upon the amended petition and the demurrer, and, being of opinion that the question of law raised by the demurrer ought to be determined by the full court before further proceedings, he reported the case for such determination.

W. H. Hitchcock, for the respondent, submitted the case upon his brief filed in the case of *Dane* v. *Treasurer & Receiver General*, 234 Mass. 42.

P. Nichols & R. A. Stewart, for the petitioner, also submitted the case upon the petitioner's brief in that case.

RUGG, C. J. The record in this case presents no facts differing in any substantial particular from those before the court in *Duffy* v. *Treasurer & Receiver General* and *Dane* v. *Treasurer & Receiver General*, 234 Mass. 42. The case at bar is governed by the decision in those cases. For the reasons there stated the entry may be

Petition dismissed.

COMMONWEALTH *vs.* FLORENCE NICKERSON.

Suffolk. July 9, 1920. — September 17, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Intoxicating Liquor. Constitutional Law, Concurrent power. *Jurisdiction. Evidence,* Matter of common knowledge. *Words,* "Concurrent," "Concurrent power," "Intoxicating liquor," "Appropriate legislation."

Statement by RUGG, C. J., of different judicial definitions of the word "concurrent."

Since, at the time of the adoption of art. 18 of the Amendments to the Constitution of the United States, there was no such universal or settled definition of the word "concurrent" as to lead to the conviction that it was employed in § 2 of the amendment, in reliance upon a judicially established meaning, its meaning as there used must be determined from its context, the purpose sought to be accomplished and a consideration of authoritative adjudications where the discussion of kindred constitutional problems has been involved.

By the words of § 2 of art. 18 of the Amendments to the Constitution of the United States, the Commonwealth possesses a continuous and independent power to enact legislation actually tending to render efficient, through its executive and judicial departments, the terms of that amendment, which legislation, in definitions, administrative agencies and penalties, may differ from but cannot be antagonistic to legislation enacted by Congress to carry out the purposes of the amendment.

State legislation, so far as in its practical operation it is appropriate to enforce the chief aim of art. 18 of the Amendments to the Constitution of the United States and to make it more completely operative in all its amplitude, is not suspended, superseded, set aside nor rendered inapplicable in its denouncements by 41 U. S. Sts. at Large, 305, known as the Volstead act, in so far as it is not incompatible with or in contravention of the provisions of that federal statute.

While, since the adoption of art. 18 of the Amendments to the Constitution of the United States and the enactment of the Volstead act, 41 U. S. Sts. at Large, 305, such provisions of R. L. c. 100, as authorize under any circumstances sales of intoxicating liquor for beverage purposes are inoperative, that entire chapter has not been abrogated, but such provisions thereof as tend toward the enforcement of the amendment's main purpose of prohibiting the sale of intoxicating liquor for beverage purposes and are not repugnant to the provisions of the Volstead act in the sense that they are antagonistic to its provisions and cannot be enforced concurrently with it remain in effect and the courts of the Commonwealth have power and jurisdiction to enforce them.

While the implied authority to sell liquor containing alcohol in excess of one half of one per cent and less than one per cent, which, by inference from the failure to prohibit such sales, was conferred by R. L. c. 100, §§ 1, 2, was made inoperative by the provisions of the Volstead act, 41 U. S. Sts. at Large, 305, the provisions of that chapter of the Revised Laws which aim at the suppression of sales of liquor containing more than one per cent of alcohol remain in force, since they

tend toward the same result as that sought by the Volstead act and seek to attain that result by means in harmony with its provisions.

The definition of intoxicating liquor in R. L. c. 100, § 2, manifests but a small practical difference from that in Title II, § 1, of 41 U. S. Sts. at Large, 305, the Volstead act, cannot be said as matter of law to include liquor in fact intoxicating, is not unreasonable, does not authorize that which the Volstead act forbids but merely fails to punish some conduct which the Volstead act denounces, provides rational and effective means for the enforcement of the chief aim of art. 18 of the Amendments to the Federal Constitution, and therefore is not obstructive of the provisions of and the purposes sought by the amendment and the Volstead act.

The provisions of R. L. c. 100, concerning the prohibition of sales of intoxicating liquor, the definition of intoxicating liquor, the penalties for the violations of these and similar provisions, and the means of enforcing them, constitute an exercise of the legislative power of the Commonwealth which, under § 2 of art. 18 of the Amendments to the Federal Constitution, giving to Congress and the several States "concurrent power" to enforce the article by appropriate legislation, the courts of this Commonwealth still have power and jurisdiction to enforce.

The circumstance that R. L. c. 100 was enacted and was in force previous to the adoption of art. 18 of the Amendments to the Federal Constitution, does not prevent the above described provisions of that statute from being "appropriate legislation," by which, under the "concurrent power" granted by § 2 of the amendment, the amendment may be enforced by the Commonwealth.

Even if that part of R. L. c. 100, § 2, which fixes "any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit," as a test of what "shall be deemed to be intoxicating liquor within the meaning of this chapter," is suspended and made of no force by the Volstead act, nevertheless a sale of whiskey would be a violation of those provisions of the State statute which remain enforceable since the enactment of the Volstead act, both because, being a "distilled spirit," whiskey is included in the definition of intoxicating liquor in § 2 of the statute as well as by name in the definition in § 1 of Title II of the Volstead act, and because, as a matter of common knowledge, it is an intoxicating liquor.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on February 13, 1920, charging the defendant with unlawfully selling intoxicating liquor on February 12, 1920, "not having then and there any license, authority or appointment, according to law, to make such sale."

On appeal to the Superior Court, the defendant filed a motion to quash the complaint, a motion to dismiss the complaint for want of jurisdiction, and a plea in bar. The questions raised by the motions and the plea related to the jurisdiction of the courts of the Commonwealth in cases involving the sale of intoxicating liquor since the passage of the Eighteenth Amendment to the Constitution of the United States and of 41 U. S. Sts. at Large, 305, the national prohibition act, commonly called the Volstead

act, more specifically of Title II of that act. The motion to quash was made both upon this ground and on the ground that no offence was set forth in the complaint because the laws of the Commonwealth in respect to the sale of intoxicating liquor are no longer in effect since the passage of the constitutional amendment and of the Volstead act.

The motions and the plea were heard by *Dubuque*, J., and were overruled.

The defendant then was tried before the same judge. Material evidence at the trial is described in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. On all the evidence the jury must return a verdict of not guilty.

"2. No offence against the laws of the Commonwealth is disclosed by the evidence as having been committed by the defendant on the date alleged in the complaint and the jury must return a verdict of not guilty.

"3. On the date alleged in the complaint there was in effect no law of the Commonwealth making the sale of intoxicating liquor unlawful.

"4. The Eighteenth Amendment to the Constitution of the United States, which was in effect on the date alleged in the complaint, supersedes the laws of the Commonwealth relating to the sale of intoxicating liquor enacted prior to the said Eighteenth Amendment, and no law of the Commonwealth was in effect on the date of the complaint unless enacted subsequent to and for the purpose of carrying into effect the said Eighteenth Amendment.

"5. On the date alleged in the complaint there was no law of the Commonwealth carrying into effect the provisions of the Eighteenth Amendment to the Constitution of the United States.

"6. On the date alleged in the complaint the only law in effect in this Commonwealth relating to the sale of intoxicating liquors was chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session (Volstead act).

"7. Chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session (Volstead act), which was in effect on the date of the complaint, superseded all laws of this Common-

wealth relating to the sale of intoxicating liquors which were in existence on the date of the complaint.

"8. Neither this court nor any court of the Commonwealth has jurisdiction of any offence committed against chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session.

"9. According to the decision of the Supreme Court of the United States, in the case of Rhode Island v. Palmer, Attorney-General, [253 U. S. 350] rendered on the seventh day of June, 1920, in the absence of appropriate legislation by State legislators to put into effect the Eighteenth Amendment to the Constitution of the United States, the only law relating to the sale of intoxicating liquors is chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session, and said chapter 83 [85] is the paramount law in all the states.

"10. According to the decision of the United States Supreme Court in the case of Rhode Island v. Palmer, Attorney-General, rendered June 7, 1920, the Legislature of this Commonwealth not having enacted on or previous to the date alleged in the complaint any legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States, the only law in the Commonwealth on that date was chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session, and this court has no jurisdiction of any offence against that law.

"11. The Congress of the United States under the Eighteenth Amendment to the Constitution of the United States had power to make laws relating to the sale of intoxicating liquor and on the date of the complaint had made such a law, to wit, chapter 83 [85] of the Acts of the Sixty-sixth Congress of the United States, first session, which was the supreme law of the land, and the laws of the Commonwealth relating to the sale of intoxicating liquor enacted prior to that date are inconsistent and at variance with said chapter 83 [85] and, therefore, the laws of the Commonwealth relating to that subject are void and of no effect."

The judge refused so to rule. The defendant was found guilty.

After the verdict and before the entry of judgment, the defendant filed a motion in arrest of judgment, raising the same

questions that were raised by the motions and plea filed before trial and by the requests for rulings herein set forth. This motion also was overruled.

The judge thereupon reported the case for determination by this court.

The case was argued at the bar in July, 1920, before *Rugg*, C. J., *Braley, De Courcy, Crosby, & Carroll*, JJ., and afterwards was submitted on briefs to all the Justices.

A. M. Burroughs, for the defendant.

D. M. Lyons, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. The defendant is charged with having sold intoxicating liquor without license and contrary to law at Boston on February 12, 1920. The complaint is framed under R. L. c. 100, §§ 1 and 53, in two counts for two separate sales. The only evidence offered at the trial tended to show that the defendant on the date alleged made two distinct sales of whiskey, containing forty-seven per cent of alcohol by volume at sixty degrees Fahrenheit. The defendant offered no evidence. It is not contended that she was authorized to make the sales either by federal or State law. The single question raised on the record and argued at the bar is whether the statute of this Commonwealth prohibiting such sales without a license and providing penalty for the violation thereof is valid and enforceable since the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of the national prohibition law.

The Eighteenth Amendment was proclaimed as having been ratified and thus become a part of the fundamental law of the land, on January 29, 1919. 40 U. S. Sts. at Large, 1941. Its first two sections, being the ones here pertinent, are in these words:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

Congress, pursuant to the power conferred upon it by the second section of the Eighteenth Amendment "to enforce this article by appropriate legislation," has enacted the national pro-

hibition law, being Act of October 28, 1919, c. 85, Acts Sixty-sixth Congress, 41 U. S. Sts. at Large, 305, known as the Volstead act.

Confessedly both the Eighteenth Amendment and the Volstead act were in force and effect on the date named in the complaint and at the time of the sales involved in the case at bar.

By Title II, § 1 of the Volstead act it is provided that "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes," with exceptions not here material. By § 3 of the same title it is provided that "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." By § 29 the penalty for a sale of liquor in violation of Title II is for a first offence a fine of not more than $1,000 or imprisonment not exceeding six months, and for a second or subsequent offence a fine of not less than $200 nor more than $2,000 and imprisonment for not less than one month nor more than five years.

1. The construction given by the Supreme Court of the United States to the Eighteenth Amendment and to the Volstead act is binding upon this court. The only decision of that court throwing light upon the pending question is *National Prohibition Cases*, 253 U. S. 350, decided on the seventh of last June. Although one aspect of the Eighteenth Amendment was adjudged in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* 251 U. S. 146, 163, 164, it is not relevant to the contentions raised in the case at bar. It was held in substance in the first five conclusions of the opinion in *National Prohibition Cases*, concerning the Eighteenth Amendment, that (1) the resolution of Congress proposing it was sufficient in form, (2) it was lawfully proposed by Congress to the Legisla-

tures, (3) ratification thereof by the Legislature was not subject to referendum provisions of State constitutions and statutes, (4) its subject matter was within the power of amendment reserved in the Constitution, (5) it has become a part of the Constitution of the United States. The next four conclusions are in these words:

"6. The first section of the amendment — the one embodying the prohibition — is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a State Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

"7. The second section of the amendment — the one declaring 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation' — does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power,' in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."

By conclusion 10 the Volstead act is declared applicable indifferently to the disposal for beverage of liquors manufactured before and after the Eighteenth Amendment became effective, and by conclusion 11 the declaration of that act that liquors containing as much as one half of one per cent of alcohol by volume and fit for use for beverage shall be treated as intoxicating was held to be within the scope of the Eighteenth Amendment.

2. It thus is apparent that the words "concurrent power" as

used in the Eighteenth Amendment have not yet been authoritatively and explicitly defined with reference to circumstances like those disclosed in the case at bar. It becomes necessary for us to consider the meaning of those words so far as necessary to the present decision.

The word "concurrent," like most other words, has different meanings dependent upon the connection in which it occurs and the end to be accomplished by its use. It is a common word found in many different associations. There are numerous decisions in which the word has been defined or used in a specific sense. It was said in *Nielsen* v. *Oregon*, 212 U. S. 315, at page 319: "In *Wedding* v. *Meyler*, 192 U. S. 573, 584, construing the term 'concurrent jurisdiction' as given to Kentucky and Indiana over the Ohio River, this court . . . said, 'Concurrent jurisdiction, properly so called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase.'" *Nicoulin* v. *O'Brien*, 248 U. S. 113. The result of this kind of grant of power to two different States is that while one may legislate effectively over the entire river in the absence of conflicting statutes by another State having like power, it cannot punish one for doing within the territory of another State acts authorized by its laws. It seems to us obvious from the *National Prohibition Cases* that the concurrent power of the Eighteenth Amendment cannot be of this nature as to both Congress and the States. The decisions of State and inferior federal courts have been somewhat divergent concerning the meaning of the word "concurrent" in the same connection as before the court in *Nielsen* v. *Oregon*. Compare *State* v. *Moyers*, 155 Iowa, 678, *Roberts* v. *Fullerton*, 117 Wis. 222, *State* v. *Faudre*, 54 W. Va. 122, and decisions collected, *Nielsen* v. *Oregon*, *supra*.

There are several other instances where the word "concurrent" has been explained or defined in the judgments or opinions of justices of the Supreme Court of the United States. In *Fox* v. *Ohio*, 5 How. 410, at pages 418, 419, it is said respecting the powers of the general government and the States: "It very clearly appears . . . that there may be an exercise of concurrent jurisdiction in the case of a granted power; that the mere grant works no exclusion of State sovereignty, even where its con-

current exercise may lead to occasional interference in the policy of either government, and that nothing short of absolute and total repugnancy will suffice." In *Houston* v. *Moore*, 5 Wheat. 1, at page 49, Mr. Justice Story, after enumerating three classes of cases of exclusive powers vested in Congress, used this language: "In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being 'the supreme law of the land' are of paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield." In the *Passenger Cases*, 7 How. 283, it was said by Mr. Justice M'Lean at page 396, "A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution," and at page 399, "A concurrent power excludes the idea of a dependent power." In *Prigg* v. *Pennsylvania*, 16 Pet. 539, at page 622, the question was posited and answered "whether the power of legislation upon this subject [fugitive slaves] is exclusive in the national government, or concurrent in the States, until it is exercised by Congress. In our opinion it is exclusive." In *Gibbons* v. *Ogden*, 9 Wheat. 1, at page 209, it was said that the proposition could not be established that "the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States." In *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, it was said at page 209, "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all;" and at page 211, "Within the second class of cases—those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots: *Cooley* v. *Philadelphia Board of Wardens*, 12 How. 299;

Steamship Company v. *Joliffe*, 2 Wall. 450; *Ex parte McNiel*, 13 Wall. 236; *Wilson* v. *McNamee*, 102 U. S. 572; quarantine and inspection laws and the policing of harbors: *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *City of New York* v. *Miln*, 11 Pet. 102; *Turner* v. *Maryland*, 107 U. S. 38; *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455; the improvement of navigable channels: *County of Mobile* v. *Kimball*, 102 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Huse* v. *Glover*, 119 U. S. 543; the regulation of wharfs, piers, and docks: *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; the construction of dams and bridges across the navigable waters of a State: *Willson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245; *Cardwell* v. *American Bridge Co.* 113 U. S. 205; *Pound* v. *Turck*, 95 U. S. 459; and the establishment of ferries: *Conway* v. *Taylor's Executor*, 1 Black, 603.

"Of this class of cases it was said by Mr. Justice Curtis in *Cooley* v. *Board of Wardens*, 12 How. 299, 318: 'If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, (Federalist, No. 32,) and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations.'"

We are unable to deduce from these decisions a universal definition of "concurrent," or one so well settled as to lead to the conviction that it was employed in the Eighteenth Amendment in reliance upon a judicially established meaning. Its meaning as used in that amendment must be determined from its context, the purpose to be accomplished and a consideration of authoritative adjudications where the discussion of kindred constitutional problems has been involved.

The Eighteenth Amendment was framed by Congress and by it submitted to the Legislatures of the several States. The debates of Congress concerning the amendment, to which resort might be had in appropriate instances, do not appear to us to throw light upon the meaning of the word "concurrent." We do not pause to review what there was said. See, however, remarks of the author of the Volstead act, 59 Congressional Record, March 23, 1920, pages 5146–5148.

This is the only instance to be found in the Constitution or any of its amendments where there is a definite declaration that both Congress and the several States have "concurrent power to enforce" any constitutional mandate or power "by appropriate legislation." Certain powers are reserved to the States. Article 1, § 8. Article 10 of the amendments. Certain powers are prohibited to the States and certain other powers can be exercised by the States only by consent of Congress. Article 1, § 10. But in the Eighteenth Amendment alone is there express establishment of the existence of concurrent power in Congress and the several States to enforce by legislation its provisions.

The words of the second section of the Eighteenth Amendment are specific to the point that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." This phrase is significantly different from that found in corresponding sections of the thirteenth, fourteenth and fifteenth amendments. In those three instances Congress alone is given power "to enforce" "by appropriate legislation." Here the several States are joined with the Congress as depositories of concurrent legislative power. It is reasonable to presume that this change in phraseology was adopted understandingly and imports an intention to effect a change in substance and in scope of the power. *Slaughter-House Cases*, 16 Wall. 36, 74. It is hardly likely that in an instrument of such transcendent importance as an amendment to the Constitution, the conjoining of Congress and the separate States as severally possessors of legislative power for enforcement of prohibition should under any circumstances be a barren grant or confer merely an insubstantial shadow upon either. The difference between the phraseology of the Eighteenth Amendment and that of the thirteenth, fourteenth and fifteenth amendments in this particular, according to the common and ap-

proved usage of language, expresses a purpose to repose in the States a substantial power capable of some measure of effective exercise under all circumstances. The words of the amendment declare a complete possession of power by the States of which they cannot be deprived by Congress. The force and effect of the words of the Eighteenth Amendment, while possibly enlarging the permissible scope of State legislation respecting importation and exportation of intoxicating liquors, leaves open to State legislation the same field theretofore existing for the exercise of the police power concerning intoxicating liquors subject only to the limitations arising from the conferring of like power upon Congress with its accompanying implications, whatever they may be.

Having regard only to the words of the Eighteenth Amendment, the Congress and the several States are placed upon an equality as to legislative power. It is only when the amendment is placed in its context with other parts of the Constitution that the supremacy of the act of Congress if in direct conflict with State legislation becomes manifest.

There is a group of cases which hold that, while the general power to deal with some subjects is vested in Congress by the Constitution, yet in the absence of action by Congress, if the power is not denied to the States, legislation by them touching the subject is valid and enforceable. By art. 1, § 8 of the Constitution, Congress is given power "To establish . . . uniform laws on the subject of bankruptcies throughout the United States." There are no words in the Constitution as to the power of States over bankruptcies. Until Congress has acted by passing a general bankrupt law the several States may enact laws of that nature, which are suspended when Congress acts upon the subject. See, for example, *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193; *Ogden* v. *Saunders*, 12 Wheat. 213; *Griswold* v. *Pratt*, 9 Met. 16. Those decisions rest on the principle that a uniform law on bankruptcies throughout the United States cannot readily coexist as operative legislation with various State laws covering the same field. That principle in our opinion is not applicable to the subject matter of the Eighteenth Amendment. There is no inherent or necessary incompatibility between the contemporaneous existence and enforcement of both federal and State

laws designed to enforce prohibition. Therefore it is manifest to us that the explicit words of § 2 vesting "concurrent power" to enforce prohibition both in Congress and in the States mean something more than the "concurrent power" to which reference is made in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193, as existing without express words.

Congress is given power by art. 1, § 8 of the Constitution "to regulate Commerce with foreign Nations, and among the several States." The first of these comprehends a power to enact a system of quarantine laws. It has been held that State laws respecting quarantine "are valid until displaced or contravened by some legislation by Congress." In the presence of such action "all State laws on the subject will be abrogated, at least so far as the two are inconsistent." *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455. *Compagnie Française de Navigation à Vapeur* v. *Louisiana State Board of Health*, 186 U. S. 380. *Louisiana* v. *Texas*, 176 U. S. 1, 21. State and national laws respecting pilots, *Olsen* v. *Smith*, 195 U. S. 332, 341, *Anderson* v. *Pacific Coast Steamship Co.* 225 U. S. 187, and bridges over navigable streams, *Gilman* v. *Philadelphia*, 3 Wall. 713, *Escanaba Co.* v. *Chicago*, 107 U. S. 678, *Cardwell* v. *American Bridge Co.* 113 U. S. 205, so long as not inconsistent with federal statutes, both are upheld, although of course when Congress speaks its power is paramount over conflicting statutes of the States.

There is a large group of decisions with respect to State laws affecting interstate commerce which have been upheld in the absence of conflict with some federal law. See, for example, *Northern Pacific Railway* v. *Washington*, 222 U. S. 370, 377, 379; *Second Employers' Liability Cases*, 223 U. S. 1, 53–55; *Corbett* v. *Boston & Maine Railroad*, 219 Mass. 351. Power of this nature in the States has been said in substance not to be "concurrent" with the power of Congress. *Gibbons* v. *Ogden*, 9 Wheat. 1, 207–209. The words "concurrent power" in the Eighteenth Amendment cannot in our opinion rightly be held to confer only that kind of legislative power upon the States.

Cases of these classes are illustrative of the converse of the situation created by the Eighteenth Amendment. In cases where Congress has the right of exclusive jurisdiction and puts forth its power to cover the field, then State legislation ceases to have

efficacy. That is because Congress has under the Constitution the power of exclusive dominion in the field. *Erie Railroad* v. *New York*, 233 U. S. 671. *St. Louis, Iron Mountain & Southern Railway* v. *Edwards*, 227 U. S. 265. *New York Central Railroad* v. *Winfield*, 244 U. S. 147.

Congress has not exclusive but only concurrent power over the subject of intoxicating liquor by the specific terms of the Eighteenth Amendment.

The prohibition or regulation of the manufacture and sale of intoxicating liquors previous to the ratification of the Eighteenth Amendment was within the exclusive jurisdiction of the States in the exercise of the police power, a power in general denied to the United States except as incidental to some other power conferred upon it by the Constitution, and reserved to the States by the Tenth Amendment. *Hamilton* v. *Kentucky Distilleries Co.* 251 U. S. 146, 156.

The scope and incidents of an express power of the general government are the same as those of an implied power. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 267, 300. In determining the kind of concurrent power reserved to or conferred upon the several States by the Eighteenth Amendment when confessedly the word "concurrent" has been used with different meanings or to convey different conceptions, the considerations which have been adverted to seem to us entitled to weight.

In our opinion it would be unsound to hold that these categorical words of grant of concurrent power both to Congress and to the States to enforce the article by appropriate legislation confer no more upon the States than would be implied without these words.

Conclusions 8 and 9 of the opinion in *National Prohibition Cases*, *ubi supra*, by holding that the words "concurrent power" in the amendment do not mean joint power nor power divided between the Congress and the several States along the lines of division between foreign and interstate on the one side and intrastate commerce on the other, but that the power of Congress is "not exclusive" nor "affected by action . . . on the part of the several States or any of them," convey to us the plain intimation as an inevitable concomitant proposition that effective independent legislation remains a function of the States.

The words "concurrent power" occur in an amendment to a constitution. In framing such instruments words naturally are employed in a comprehensive sense as expressive of general ideas rather than of finer shades of thought or of narrow distinctions. The simple and dignified diction of a constitution does not readily lend itself to technical definition. There the terse statement of governmental principles in plain language may be looked for.

The amendment does not require that the exercise of the power by Congress and by the States shall be coterminous, coextensive and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the State legislation must yield.

We are of opinion that the word "concurrent" in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the State even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the States need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the States need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead act, nor provide the same penalties therefor. It is conceivable also that a State may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the States may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several States appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void nor inoperative simply because Congress in performance of the duty cast upon it by that amendment has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in § 1 of the amendment by different definitions, regulations and penalties from those contained in the Volstead act and not in

conflict with the terms of the Volstead act but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of national prohibition does not exclude the operation of appropriate State legislation directed to the enforcement by different means of prohibition within the territory of the State.

The power thus reserved to the States must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the act of Congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the States is constant, vital, effective and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implications of conclusions 8 and 9 of the opinion in *National Prohibition Cases*, and from the other decisions to which reference has been made.

3. If, however, we are wrong in this interpretation of the words "concurrent power" in the amendment, the same general result in its effect on the case at bar seems to us to follow from numerous decisions of the Supreme Court of the United States respecting State legislation concerning other subjects within the paramount power of Congress under the Constitution, decisions which appear to us also to fortify the conclusion we have reached as to the meaning of the words "concurrent power" in the Eighteenth Amendment. The concurrent power of the States to enact legislation as to matters about which Congress has acted is given in these decisions a still different meaning from that attributed to it in cases like *Sturges* v. *Crowninshield*, 4 Wheat. 122, or at least is afforded a wider scope for effective operation.

The general principle as to the right of the States to exercise the power of effective legislation concerning subjects over which Congress also has power was stated in these words (summarizing language of Mr. Justice Story in *Houston* v. *Moore*, 5 Wheat. 1, at page 49) in *Gilman* v. *Philadelphia*, 3 Wall. 713, at page 730: "The States may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the Federal Constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where, from the nature and

subjects of the power, it must necessarily be exercised by the National Government." Illustrations of the scope and application of those principles are found in numerous decisions, where they are amplified and made even more clear in the judgments rendered. In *Fox* v. *Ohio*, 5 How. 410, the plaintiff in error was indicted for "passing and uttering" counterfeit coin contrary to a statute of Ohio. The United States Constitution by art. 1, § 8, confers upon Congress power to punish counterfeiting. In holding valid the conviction under the State statute, it was said at pages 434, 435: "It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offence of passing base coin, and the federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the Constitution, declaring that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the Constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments, in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. . . . It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender, who should have suffered the penalties denounced by the one, would not be subjected a second time to punishment by the other, for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain

or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." In *Ex parte Siebold*, 100 U. S. 371, the question arose as to the effect of the exercise by Congress of its power over the election of members of Congress upon State laws inflicting punishment for the same wrongful acts inhibited by the act of Congress. It was stated at page 390 *et sequentia* that Mr. Justice Daniel in "delivering the opinion of the court in the case of *United States* v. *Marigold* (9 How. 569), where a conviction was had under an act of Congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case:* 'With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of *Fox* v. *State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;' and the conviction was sustained. The subject came up again for discussion in the case of *Moore* v. *State of Illinois* (14 id. 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence against the United States under the fugitive-slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: 'Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.' Substantially the same views are expressed in *United States* v. *Cruikshank* (92 U. S. 542), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization laws to admit to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offence, even

though he might also, under the State laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State? If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State, — as we think they are, — then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act." In *United States* v. *Amy*, 24 Fed. Cas. 792 (quoted in a note in 14 Md. 149), in the course of an opinion by Chief Justice Taney respecting an indictment under a law of the United States for stealing letters of value from the post office, it was said (810, 811): "In maintaining the power of the United States to pass this law, it is, however, proper to say that, as these letters, with the money in them, were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference to the post office or the act of Congress; because, from the nature of our government, the same act may be an offence against the laws of the United States and also of a State, and be punishable in both. This was considered and decided in the Supreme Court of the United States in the case of *Fox* v. *Ohio*, 5 How. 433, and in the case of *United States* v. *Marigold*, 9 How. 560; and the punishment in one sovereignty is no bar to his punishment in the other." *Cross* v. *North Carolina*, 132 U. S. 131, 139. *Commonwealth* v. *Barry*, 116 Mass. 1. In *Reid* v. *Colorado*, 187 U. S. 137, a State inspection law was upheld applicable to live stock coming into one State from another and thus directly affecting and impeding interstate commerce, even when the same stock was subject to inspection under an act of Congress and had been inspected in accordance therewith. It was said at page 148: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly

manifested. This court has said — and the principle has been often reaffirmed — that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243." To the same general effect are *Asbell* v. *Kansas*, 209 U. S. 251, 257, *Commonwealth* v. *Moore*, 214 Mass. 19, *Ex parte Guerra*, 94 Vt. 1, *State* v. *Hosmer*, 144 Minn. 342. See *Southern Railway* v. *Indiana Railroad Commission*, 236 U. S. 439, 445, 446; *State* v. *Tachin*, 92 N. J. L. 269.

The facts in *Sexton* v. *California*, 189 U. S. 319, were these: Extortion for falsely threatening to accuse one of selling cigars in old boxes was made a crime by federal statute. The plaintiff in error was convicted of extortion under a statute of California upon evidence showing commission of the federal offence. It was held that the conviction must stand as good under U. S. Rev. Sts. § 5328 (now Federal Penal Code Act of March 4, 1909, c. 321, § 326, 35 U. S. Sts. at Large, 1151). "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." It was said at page 324: "The section (5328) was not intended to merely permit a State court to punish a different offence involved in the one act. It was intended to leave with the State court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject." *Crossley* v. *California*, 168 U. S. 640, 641.

It appears to us that the express mandate of the fundamental law conferring "concurrent power" upon the States, as well as upon Congress, to legislate concerning the prohibition of the sale of intoxicating liquors, must have at least as much potency as a simple act of Congress such as was construed in *Sexton* v. *California*.

The words of § 3, Title II of the Volstead act, to the effect that "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," would seem to indicate a purpose not to nullify State laws operating to that end unless imperatively necessary from independent considerations. The Volstead act manifests no in-

tent on the part of Congress to supersede or suspend State statutes not directly repugnant thereto on the same subject. Even if under the Eighteenth Amendment Congress has the clear power to do so, its enactment would not be given that effect except in instances where its design to accomplish that result is plain and the repugnance between the federal and the State statute is absolute, positive and irreconcilable so that both cannot stand together. *Missouri, Kansas & Texas Railway* v. *Harris*, 234 U. S. 412, 419. *Illinois Central Railroad* v. *State Public Utilities Commission of Illinois*, 245 U. S. 493, 510.

In *Railroad Co.* v. *Fuller*, 17 Wall. 560, at page 568 (quoting from *Ex parte McNiel*, 13 Wall. 236, 240), occurs this statement: "In the complex system of polity which exists in this country the powers of government may be divided into four classes:

"Those which belong exclusively to the States.

"Those which belong exclusively to the National Government.

"Those which may be exercised concurrently and independently by both.

"And those which may be exercised by the States but only until Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur."

There is here express recognition of a field of legislation, apart from definite constitutional mandate such as is in the Eighteenth Amendment, over which jurisdiction may be exercised both by Congress and by the States "concurrently and independently."

In our opinion the irresistible conclusion from these decisions is that State legislation which in its practical operation is appropriate to enforce the chief aim of the Eighteenth Amendment and to make it more completely operative in all its amplitude is not suspended, superseded, set aside nor rendered inapplicable in its denouncements by the Volstead act, in so far as not incompatible therewith or in contravention of its provisions.

4. It remains to examine the present force and effect of the statutes of this Commonwealth, under which the complaint against the defendant was framed, in the face of the Eighteenth Amendment and the Volstead act. Previous to the adoption of the Eighteenth Amendment and the war prohibition act, the entire subject of intoxicating liquors, including total or partial

prohibition of the manufacture, transportation and sale and the regulation thereof, apart from interstate commerce, was vested in this Commonwealth as a part of its police power. *Mugler* v. *Kansas*, 123 U. S. 623. *In re Rahrer, petitioner*, 140 U. S. 545. *South Carolina* v. *United States*, 199 U. S. 437, 453. The General Court in the exercise of that power enacted R. L. c. 100. Its title is "Of Intoxicating Liquors." The broad scope of that chapter is expressed in § 1 in these words: "No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter. . . ." There are ninety sections in the chapter, wherein intoxicating liquors are defined and provision made in considerable detail for an annual vote in each of the several cities and towns upon the question whether during the year licenses shall be granted therein for the sale of intoxicating liquor, for the establishment of licensing boards in such municipalities as vote yes upon that question, for the granting therein of several classes of licenses, the fees and conditions of licenses, the authority thereby conferred, the regulation and inspection of licensed places, for licenses to dealers in paints and chemicals and to druggists and apothecaries, for the punishment of violations of the statute and for the recovery of certain kinds of civil damages arising from designated uses, abuses and sales of intoxicating liquor.

It is plain that since the enactment of the Eighteenth Amendment the provisions of this chapter, so far as they authorize under any circumstances whatsoever sales of intoxicating liquor for beverage, are inoperative. *National Prohibition Cases*, 253 U. S. 350. Many sections of the chapter now are not enforceable because repugnant to the provisions of the Eighteenth Amendment. It was all operative and valid and strictly within the constitutional power of the Legislature when enacted. The point now is to ascertain whether the parts under which the present complaint is brought still remain valid and enforceable.

This point is not the same which would arise where a whole statute has been enacted, some parts of which are beyond legislative power under then existing constitutional provisions. In such cases one part of the statute may be valid and enforceable and another part obnoxious to some constitutional inhibition, subject to "this limitation, that the parts, so held respectively

constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84, 99. These words of Chief Justice Shaw often have been quoted with approval by the Supreme Court of the United States. *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 113. The facts stated as the basis of that principle are not the facts here presented. The intent of the Legislature is not germane to the present inquiry. Its intent existed at the time of the enactment of the statute. Its expression of intent then indubitably was valid throughout. The statute was altogether impregnable in its constitutional aspects. The precise question is, how much of a statute perfectly valid throughout at the time of its enactment remains enforceable now that since its enactment a superior power has supervened with a fundamental governing law at variance with some of its terms.

Section 2 of c. 100 defined intoxicating liquor in these words: "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter." By § 53 the penalty for making a sale of intoxicating liquor in violation of the chapter is "a fine of not less than fifty nor more than five hundred dollars, and by imprisonment for not less than one nor more than six months," although both fine and imprisonment need not be imposed if the defendant satisfies the court that he has not before been convicted of a similar offence. R. L. c. 220, § 10. Thus the provisions of c. 100 differ from those of the Volstead act in respect of the definition of intoxicating liquor and the penalties provided for sales in violation of their terms. These provisions of R. L. c. 100, however, tend toward the enforcement of the main end of the Eighteenth Amendment of prohibiting the sale of intoxicating liquors for beverage purposes. They are not

repugnant to the provisions of the Volstead act in the sense that they are mutually antagonistic and incapable of being concurrently enforced. Of course the implied authority conferred by §§ 1 and 2 of R. L. c. 100, to sell liquor containing alcohol in excess of one half of one per cent and less than one per cent inferable from the failure to prohibit such sales is no longer operative in view of the Volstead act. Such sales cannot now be made lawfully. If made they constitute a crime under the Volstead act, but not a crime under the law of the Commonwealth. But aside from that, other provisions of c. 100 aimed at the suppression of sales of liquor containing more than one per cent of alcohol have a tendency to enforce prohibition of the use of such liquor for beverage purposes. They will be enforced by judicial tribunals of a different sovereignty. They tend toward the same result by harmonious means. The definitions in R. L. c. 100, § 2, and in Title II, § 1 of the Volstead act, are alike in including by name "ale" and "porter;" that of the former is "strong beer, lager beer, cider, all wines" and of the latter "beer, ale, porter, and wine." The words "alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and . . . any spirituous . . . liquor" of the Volstead act are included within the more compendious phrase "distilled spirits" of R. L. c. 100, § 2. These differences manifest no conflict nor antagonism between the two statutes. There is small practical difference between them. As we construe these provisions of the State statute, they do not authorize that which the Volstead act forbids. They simply fail to punish some conduct which the Volstead act denounces. The definition of intoxicating liquor contained in R. L. c. 100, § 2, is not unreasonable. It does not facilitate the use of intoxicating liquor as a beverage but on the contrary tends to repress such use. It cannot be said as matter of law to include liquor in fact intoxicating. See in this connection *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 282 to 298 and notes. The words of R. L. c. 100, § 2, express the policy of the Commonwealth as declared by the General Court. They establish the policy of the Commonwealth respecting the enforcement of the Eighteenth Amendment through its executive, administrative and judicial departments. They provide rational and effective means toward the enforcement of the chief aim of the Eighteenth Amendment. They are not obstructive of the

Volstead act. They are operative in our opinion under any of the views of "concurrent power" hereinbefore set forth.

There are other provisions of the chapter which are susceptible of being operative notwithstanding general and national prohibition. The rules as to evidence, §§ 64, 65, the provisions for search warrants for contraband liquors, §§ 72–79, 81–85, arrest without warrant, § 86, declaring common nuisances intoxicating liquors kept for sale contrary to law and implements and vessels actually used in selling and keeping the same, § 87, and declaring club houses used for selling, distributing or dispensing intoxicating liquor to be common nuisances, § 88, as to burden of proof, R. L. c. 219, § 7, all are efficacious means for the enforcement of the mandate of the Eighteenth Amendment. Other sections of R. L. c. 100, and other statutes passed since the Revised Laws of the same general nature may still be in force, to which it is not necessary to refer in detail.

The general purpose of R. L. c. 100, is prohibition, except as local option manifested by annual votes in the several municipalities effectuated by the granting of licenses through municipal boards may result in a regulated method of sales by licensees. The burden of proving such authorization rests upon a defendant, however. Upon a complaint for an illegal sale the Commonwealth makes out its case by showing a sale of intoxicating liquor. The defendant, in order to escape conviction, must prove his license. R. L. c. 219, § 7. *Commonwealth* v. *Regan*, 182 Mass. 22, 25. As matter of statutory construction, the prohibition is general, the license is exceptional. The latter is dependent upon the efficacy of a valid local vote and a genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting license as to be swept away when those as to license are stricken down by the Eighteenth Amendment. The general rule of the statute continues to prevail even though the law has so changed that the special defence can no longer be made out.

It follows that R. L. c. 100, has not been abrogated by the Eighteenth Amendment and the Volstead act. The sections under which the complaint was framed against the defendant are still operative and efficacious.

5. The circumstance that R. L. c. 100, was enacted prior to the

adoption of the Eighteenth Amendment does not prevent it from being "appropriate legislation" to enforce that amendment. The words "appropriate legislation" in that amendment do not of necessity require future and exclude existing legislation. A State law already enacted is within the purview of the words "appropriate legislation" as used in the Eighteenth Amendment. If existing legislation is adapted to the end in view, it is enforceable.

As has already been pointed out, the subject of the regulation or prohibition of traffic in intoxicating liquors, apart from interstate or foreign commerce in them, was within the police power of the several States until the adoption of the Eighteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623. That amendment conferred no new power upon the States, so far as concerns the provisions of R. L. c. 100. It recognizes and continues and to a certain extent limits pre-existing power. It confers new power upon the federal government. It does not expressly abrogate existing State legislation rationally adapted to the enforcement of the amendment. If that had been the purpose of its framers, expression thereof would have been simple and natural. Omission of words indicative of that purpose are significant that it did not exist.

The principle was declared in *In re Rahrer, petitioner*, 140 U. S. 545, 564, 565, that a State statute, invalid at the time of its enactment for the reason that it infringed upon the federal power and was unconstitutional, was rendered valid and enforceable without re-enactment simply by the subsequent passage of an act of Congress removing an impediment to the enforcement of the State law and thus conferring jurisdiction in that particular upon the States. That principle seems to us equally applicable to the situation presented in the case at bar. The force of that decision would uphold R. L. c. 100, to the extent to which we have decided it to be in effect, even if the power conferred upon the State by the Eighteenth Amendment had been a grant of new power.

Whichever may be the true view of the effect of the Eighteenth Amendment in this particular, we are of opinion that R. L. c. 100 is in the sections affecting the case at bar valid and enforceable. *Commonwealth* v. *Calhane*, 154 Mass. 115. *Lawton Spinning Co.*

v. *Commonwealth*, 232 Mass. 28, 35, 36. *Ward* v. *Proctor*, 7 Met. 318. *Lothrop* v. *Highland Foundry Co.* 128 Mass. 120. *Tua* v. *Carriere*, 117 U. S. 201, 209. *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512, 523, 524.

6. If, however, we are in error in holding that the definition of intoxicating liquor in R. L. c. 100, § 2, is still valid to the extent that, aside from liquors specifically named as intoxicating, only "any beverage which contains more than one per cent of alcohol . . . shall be deemed to be intoxicating liquor," as the basis for prosecution under the laws of this Commonwealth; and if the only permissible definition in that particular is that established in the Volstead act, Title II, § 1, namely, aside from specified liquors, "any spirituous, vinous, malt, or fermented liquor, liquids, and compounds . . . containing one-half of 1 per centum or more of alcohol," we are of opinion that the present complaint is well founded. We assume that the definition of intoxicating liquors contained in the Volstead act cannot be imported into our statute without legislative action. The offence set forth in the complaint, namely, selling intoxicating liquor, is an offence under the sections of c. 100 still remaining enforceable, upon the hypothesis that § 2 has been rendered null and void or at least unenforceable except so far as exactly coextensive with Title II, § 1 of the Volstead act. The only evidence in the case at bar tended to show sales by the defendant of whiskey for beverage purposes. Whiskey is as clearly within the definition of intoxicating liquor in R. L. c. 100, § 2, as in Title II, § 1 of the Volstead act. It is specified in each. The sale of it under the circumstances here disclosed is as much a crime under the one statute as under the other. For the reasons already stated, § 1 of c. 100 is not annulled even if § 2 be determined to be no longer valid. The complaint charges a sale of intoxicating liquor contrary to law. We are of opinion that the complaint is not defective even if it be assumed that that part of the definition of intoxicating liquor in R. L. c. 100, § 2, which fixes more than one per cent of alcohol as the test in the absence of any other, is no longer operative and is suspended by provisions of the Volstead act.

Even if every part of the definition of intoxicating liquor contained in said § 2 were no longer in force, then the thing forbidden by c. 100 is sale of intoxicating liquor, without a statutory defi-

nition of what such liquor is. The term "intoxicating liquor" nevertheless is definable. In the trial of such a complaint the question under this hypothesis would be an "issuable fact whether or not a particular liquor . . . sold as a beverage is intoxicating." *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 282. *United States* v. *Standard Brewery Co.* 251 U. S. 218. The evidence was that liquor sold by the defendant was whiskey. As matter of common knowledge that is intoxicating liquor. *Commonwealth* v. *Morgan*, 149 Mass. 314, 316. *Commonwealth* v. *Grey*, 2 Gray, 501. *Commonwealth* v. *Herrick*, 6 Cush. 465, 468. No question is raised on this record as to that point nor as to the correctness of the instructions given. If the evidence had required, the defendant would have been entitled to an instruction to the effect that if the liquor sold contained one half of one per cent of alcohol or more, but less than one per cent of alcohol, a verdict of not guilty must be returned. If those had been found to be the facts there would have been no offence under our statute. But no such contention has been presented on this record.

The court are unanimous in what is said under paragraphs numbered 1, 2 and 3 of this opinion. What is said under paragraphs numbered 4, 5 and 6 is concurred in by a majority of the court.

The conclusions which we have reached summarily stated are these:

A. The words "concurrent power" as used in the Eighteenth Amendment have not yet been defined by the Supreme Court of the United States with reference to facts such as are here presented.

B. By the words of the Eighteenth Amendment that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation," this Commonwealth possesses continuous and independent power to enact legislation actually tending to render efficient, through its executive and judicial departments, the terms of that amendment. Such legislation, in definitions, administrative agencies and penalties, may differ from but cannot be antagonistic to the act of Congress.

C. If, however, the words "concurrent power" do not preserve and recognize such ample legislative jurisdiction in the

States, they are broad enough in scope to authorize the enactment by the States of statutes, whose plain purpose and natural effect is the enforcement of the chief end of the Eighteenth Amendment and not repugnant to nor inconsistent with acts of Congress.

D. The provisions of R. L. c. 100, concerning the prohibitions of sales of intoxicating liquors, the definition of intoxicating liquor, and the penalties for the violations of these and similar provisions and the means of enforcing them, constitute a valid exercise of the legislative power of the Commonwealth under both propositions B and C just stated.

E. Those provisions of R. L. c. 100, set forth in proposition D, were not abrogated nor annulled by the Eighteenth Amendment, but are in force under the terms of that amendment although it was adopted subsequent to the enactment of R. L. c. 100.

F. Even if the definition of intoxicating liquors given in R. L. c. 100, § 2, in so far as it fails to define as intoxicating that liquor which contains one half of one per centum of alcohol or more up to and including one per cent of alcohol, no longer has validity since the enactment of the Volstead act, the present complaint is well founded under the remaining enforceable provisions of R. L. c. 100.

It follows that no error is disclosed on this record. The motions to quash and to dismiss for want of jurisdiction, and the plea in bar, all were overruled rightly. The refusal to grant the defendant's requests for rulings was proper. The denial of the motion in arrest of judgment was correct. In accordance with the terms of the report the entry must be

Verdict to stand.

WALTON LUNCH COMPANY *vs.* JOHN J. KEARNEY & others.

Suffolk. January 6, 1920. — October 13, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & JENNEY, JJ.

Labor Union. Strike. Constitutional Law, Jury trial in proceedings for contempt of court. *Equity Jurisdiction,* Proceedings for contempt. *Jury and Jurors.*

A strike of a labor union against a corporation, which is not in violation of any contract between the employer and the employed, is legal if it is caused by a breach of good faith and of square dealing on the part of an officer of the corporation in failing intentionally, without apparent excuse and without notice, to keep an appointment, deliberately made with representatives of the union at a conference touching their contractual relations with each other, for a further conference at a specified time and place.

If, in a suit by the proprietor of a restaurant against members and officers of a labor union which include his employees, it appears that, in furtherance of the strike, patrols uttering loud outcries passed up and down on a public sidewalk in front of the plaintiff's restaurant in such a way that nearly all persons seeking to enter the restaurant were incommoded and many were deterred and intimidated from attempting to approach it, and that, due to the conduct of the patrols, crowds, with the tacit approval of the defendants, acted in such a way as seriously to incommode all and to intimidate many persons who sought to pass by or to enter the restaurant, a final decree is warranted and proper, which perpetually enjoins and restrains the defendants "from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass and intimidate the plaintiff's customers or intending customers, or his present employees or those desirous of entering his employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract."

It was *stated* that, by an appeal from the final decree in the suit above described, questions as to the lawfulness in general of any kind of picketing and as to the interpretation of St. 1913, c. 690, were not raised.

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt, wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 12, 1919, seeking to enjoin certain named individuals and

the "officers and members of a certain voluntary unincorporated association known as the Hotel and Restaurant Employees' International Alliance Union, Local No. 34," from interfering with the business of the plaintiff.

The suit was heard by *Pierce*, J., by whose order a final decree was entered on October 10, 1919, perpetually enjoining "the defendants, their agents and servants, . . . from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass, and intimidate the plaintiff's customers or intending customers, or his [its] present employees or those desirous of entering his [its] employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract." On October 14 the plaintiff appealed from the final decree.

The plaintiff also requested a report of the material facts in the case. The single justice filed such a report on October 25. Material facts found by him are described in the opinion. On October 27, the plaintiff filed a request for the following rulings of law:

"1. Upon the facts proved in this case the plaintiff is entitled to an injunction restraining the carrying on of the strike against the plaintiff by any means whatever.

"2. Upon all the evidence in the case the strike now being maintained by the defendants is an illegal one.

"3. The legality of the strike must be determined by the character of the demands presented to the plaintiff by the defendants.

"4. A strike for a purpose undisclosed to the employer is an illegal strike.

"5. The demands in this case were formulated by a vote of the union and there is no evidence that any officer had authority to alter those demands.

"6. If the demands were as stated in Exhibit 3 [not otherwise described or shown in the record], the refusal to grant them being the paramount purpose of going out on strike or one of the purposes for which the strike is maintained, it is immaterial what the immediate impelling motive which caused the men to leave their employment on September 5, 1919, was.

"7. Any picketing which is annoying, harassing, or intimidating to the plaintiff's customers or his present employees is illegal.

"8. All organized picketing or parading in front of the plain-

tiff's premises as well as any outcries by pickets or paraders is a nuisance and illegal.

"9. Any system of organized picketing in front of or near to the plaintiff's premises which interferes with the plaintiff's customers, employees, or business is illegal.

"10. A combination to persuade customers not to patronize the plaintiff is in the nature of a boycott and is illegal.

"11. Any combination to picket the plaintiff's restaurants which has the effect of intimidating, annoying, or harassing the plaintiff's employees under contract of employment with the plaintiff is illegal.

"12. Any inducing of employees under contract of employment to violate their contracts is illegal."

Upon the paper containing the foregoing requests, the single justice made the following indorsement: "The within requests for rulings were held for consideration when the final decree was filed and thereafter could not be given or refused."

On November 14, 1919, the plaintiff filed the petition for attachment for contempt, which is described in the opinion. The defendants filed a motion for a trial by jury under St. 1911, c. 339. The motion was heard by *Carroll*, J., who reported it to the full court for consideration of these two questions:

"1. Is St. 1911, c. 339, constitutional?

"2. If St. 1911, c. 339, is held to be constitutional, can a petition for contempt be heard by a single justice as to those allegations contained therein which do not charge crimes; or, if any of the allegations in the petition charge the commission of crimes, is the defendant entitled to a trial by jury under said statute as to all the allegations in the petition, even though some of them do not allege crimes?"

The case was submitted on briefs.

H. A. Baker & J. J. Feely, for the plaintiff.

F. W. Mansfield & E. R. Mansfield, for the defendants.

RUGG, C. J. This is a suit in equity by a corporation engaged in the restaurant business in Boston against named defendants as "officers and members of a certain voluntary unincorporated association known as the Hotel and Restaurant Employees' International Alliance Union, Local No. 34." The case was tried before a single justice, who entered a final decree in favor of the

plaintiff. This decree was simply one of perpetual injunction against certain acts and conduct. It did not declare whether the strike was legal or illegal. The plaintiff appealed and requested a report of the material facts. R. L. c. 159, § 23. In response to that request the single justice found that the strike was legal. A summary statement of the facts respecting that point is that in August, 1919, representatives of employees of the plaintiff sent to it for consideration a form of agreement, which if accepted would have established the principles of an absolute closed shop and which contained other provisions designed to effect changes in working conditions of its employees. On September 2, 1919, representatives of the employees and of the plaintiff met at the office of the latter and talked over the situation for about two hours. "At the conclusion of the discussion Mr. Walton [one of the representatives of the plaintiff] stated that the closed shop clause was important; that it was a change of policy, and that he wished time to think it over." It was then agreed that the conference should be renewed at the same place at a later specified time. At that time and place Walton, although in his office, "concealed that fact from those in charge of the office and from the representatives [of the employees] whom he had agreed to meet there."

The finding that this was the cause of the strike cannot be overturned. The evidence is not reported. It is not inconsistent with other facts found. Upon familiar principles it must stand.

The ruling that a strike for this cause was justifiable was right. This is not a case of a mere refusal to meet employees for discussion of demands for change of wages or working conditions. It is not a declination to confer with strangers about the subject. It is a plain case of a breach of good faith and of square dealing between man and man by intentionally failing without apparent excuse and without notice to keep an engagement deliberately made for further consultation touching their contractual relations with each other. It does not appear that the strike was in violation of the terms of any contract between the plaintiff and its employees.

All the further findings of fact, which describe the means whereby the strike was prosecuted, are in these words: "On the day following the vote to strike, and on every day and night thereafter until

September 12, 1919, the patrol, in pursuance of their appointed duties, passed up and down on the sidewalk adjacent to the principal entrance to the several restaurants, uttering loud outcries to the effect that the 'system' was unfair to labor and should not receive the public patronage. In making their apportioned round the patrol divided and made an approach to the entrance to the stores from either side. They met at the entrance and made their turns as near within the entrance as it was physically possible to do. As the distance to be covered in every instance was short, the turnings were so frequent that nearly all persons seeking to enter the restaurants were incommoded and many were deterred and intimidated from attempting to approach the restaurants. Attracted by the noise and the outcries of the patrol, large and sympathetic crowds gathered on the sidewalk near the restaurant, blocked the passage to it, hooted, jeered, hollered at, and pushed, struck, and withheld would-be customers to a degree seriously to incommode all and to intimidate many persons who sought to pass by or make an entrance to the restaurant. These acts of bystanders were not discouraged by the representatives of the employees, and I find they had their tacit approval."

The essential words of the final decree are that the defendants "are perpetually enjoined and restrained from interfering with the plaintiff's business by picketing in such a manner as to annoy, harrass, and intimidate the plaintiff's customers or intending customers, or his [its] present employees or those desirous of entering his [its] employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract."

There is no error of law in this decree. Although not minute as to details, it unmistakably enjoins in every particular all the acts and conduct of the defendants set forth in the findings of fact as means by which the strike was carried on. The scope of the decree is coextensive with findings as to methods used to enforce the strike. Forms of interference with the plaintiff's rights which are not found to have been practised or threatened are not rightly included within the terms of an injunction. *Aberthaw Construction Co.* v. *Cameron*, 194 Mass. 208, 215. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 262. Questions as to the lawfulness of any kind of picketing, *Vegelahn* v. *Guntner*,

167 Mass. 92, and as to the interpretation of St. 1913, c. 690, are not raised upon this record.

The plaintiff's requests for rulings of law are not properly before us. It is not necessary to consider any question of practice connected therewith. So far as pertinent to issues raised on the record, the questions of law thereby sought to be presented have been dealt with. As applied to this record those numbered 7, 8, 9, 10, 11, 12 were in effect granted by the entry of the decree and the others ought not to have been granted. The final decree should be affirmed.

About three weeks after the entry of the final decree a petition for attachment for contempt against the defendants was filed. The petition contained allegations charging as violations of the injunction, the commission of certain crimes and other acts not criminal in their nature. The matter came on to be heard before another justice, who has reserved for our consideration in that connection the question whether St. 1911, c. 339, is constitutional. The pertinent part of the statute is in § 1, which is in these words: "The defendant in proceedings for violation of an injunction, where it appears from the petition filed in court alleging the violation, that the violation is an act which also would be a crime, shall have the right to trial by jury on the issue of fact only, as to whether he committed the acts alleged to constitute the said violation, and the said trial by jury shall take place forthwith, and if there is no sitting of a jury in the county where the contempt proceedings are to be heard, a venire shall issue to impanel a jury forthwith." It is provided by § 2 that the act shall not apply to proceedings in the Probate Court.

It is an essential element of a court that it possesses power to enforce its orders and to protect itself from having its authority flouted. It was said by Chief Justice Gray in *Cartwright's Case*, 114 Mass. 230, 238, "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." This statement is complete, unequivocal and binding upon us. To undertake to amplify or

make it more clear by further discussion would be vain. Similar statements are to be found in the decisions of numerous other courts where the question has arisen. *State* v. *Matthews*, 37 N. H. 450. *People* v. *Tool*, 35 Col. 225, 248. *Middlebrook* v. *State*, 43 Conn. 257, 268. *In re Cooper*, 32 Vt. 253, 257. *Morrison* v. *McDonald*, 21 Maine, 550, 556. *State* v. *Doty*, 3 Vroom, 403. *State* v. *Galloway*, 5 Cold. 326, 331. *Ex parte McCown*, 139 N. C. 95, 122, 123. *State* v. *Judge of the Civil District Court for the Parish of Orleans*, 45 La. Ann. 1250, 1262. In the opinion of Mr. Justice Lamar in *Gompers* v. *Bucks Stove & Range Co.* 221 U. S. 418, at page 450, occurs this language: "While it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory." It was said by Beasley, C. J., in *State* v. *Doty*, 3 Vroom, 403, 404: "A court would fail, of necessity, to accomplish the end of its institution, if it could not maintain order and enforce obedience to its precepts. The authority is derived from necessity, and the authority ceases only when such necessity ceases." These propositions are accepted as sound by the great weight of authority. Where the question has arisen it usually has been held that it is beyond the power of the Legislature to curtail jurisdiction of courts over contempts. There are many decisions to that effect. *State* v. *Morrill*, 16 Ark. 384, 391. *Cheadle* v. *State*, 110 Ind. 301, 309. *In re Hayes*, 72 Fla. 558, 562. *McDougall* v. *Sheridan*, 23 Idaho, 191, 223. *Joyce* v. *Everson*, 161 Ind. 440, 443. *Chicago, Burlington & Quincy Railway* v. *Gildersleeve*, 219 Mo. 170. *State* v. *Judge of the District Court*, 30 Mont. 193. *In re Bowers*, 89 N. J. Eq. 307, 309, citing *Flanigan* v. *Guggenheim Smelting Co.* 34 Vroom, 647, and *In re Thompson*, 15 Buch. 221, 236. *Hawes* v. *State*, 46 Neb. 149. *In re Shortridge*, 99 Cal. 526. *In re Chadwick*, 109 Mich. 588. *Nichols* v. *Judge of Superior Court of Grand Rapids*, 130 Mich. 187. The mere fact that the act is criminal is of no consequence. When a contempt of court happens at the same time to be a crime, that does not divest the court of power to deal with it as a contempt. *In re Debs, petitioner*, 158 U. S. 564, 593, 594. Some adjudications go only to the point of holding that constitutional courts cannot be affected

by legislation undertaking to limit a power so essential to the very nature of courts. *Bradley* v. *State*, 111 Ga. 168. *Hale* v. *State*, 55 Ohio St. 210. *Carter's Case*, 96 Va. 791. *State* v. *Frew*, 24 W. Va. 416. Even if that guarded statement be assumed to be a limitation and not a simple confining of the decision to the point before the court, it would dispose of the case at bar which is pending in the Supreme Judicial Court. This court is established by the people in the Constitution as a co-ordinate department of government. Articles 29 and 30 of the Declaration of Rights. Chapter 2, § 1, art. 13, and c. 3, art. 2 of the Constitution. It has been recognized as such from the beginning by the executive and legislative departments. It has been so declared in decisions of the court. *Russell* v. *Howe*, 12 Gray, 147, 153. *Dearborn* v. *Ames*, 8 Gray, 1, 14. Article by Chief Justice Gray in 21 Monthly Law Reporter (June, 1858), 65–83. See *Commonwealth* v. *Anthes*, 5 Gray, 185, 232, 236.

Trial by jury of the question whether a contempt of court had been committed would be a serious limitation of the power of courts. It has been so held whenever the point has arisen. It was said in *Gompers* v. *Bucks Stove & Range Co.* 221 U. S. 418, 450: "There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants." In the opinion in *In re Debs, petitioner*, 158 U. S. 564, 595, these words are found: "In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." The two decisions last cited did not relate to the effect of a statute. The words quoted are sufficient to show that any statute requiring a jury trial upon contempt proceedings would be a substantial impairment of the inherent right of courts to maintain their authority. In *Carter's Case*, 96 Va. 791, in an elaborate opinion,

a statute providing for a trial by jury in contempt cases was held to be beyond the power of the Legislature. *In re Dingley*, 182 Mich. 44, 50, 51. There is no occasion for a jury trial to protect any real right, because, as was said by Mr. Justice Holmes in *United States* v. *Shipp*, 203 U. S. 563, at page 574, "The court is not a party [to proceedings for contempt]. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."

Numerous cases have arisen where courts have referred to statutes which relate to the subject of contempt. None of them contain, so far as we have observed, any discussion of the constitutional question here presented, and hence it is not necessary to refer to them. There is a federal statute concerning contempts. Judicial Code, approved March 3, 1911, c. 231, § 268. See U. S. Rev. Sts. § 725. It, however, was held in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 418, that that statute "conferred no power not already granted and imposed no limitations not already existing" apart from the statute. There is nothing at variance with this in *Ex parte Robinson*, 19 Wall. 505, where the punishment undertaken to be imposed for contempt was manifestly different from any within the jurisdiction of a court dealing with contempt. The conclusion is inevitable from these decisions, among which so far as we are aware there is no dissent, and the reasons supporting them, which need not be further recited, that this statute is unconstitutional as applied to the case at bar.

The first question must be answered in the negative. It becomes unnecessary to consider the second question reported.

Ordered accordingly.

ISRAEL GOLDMAN *vs.* CITY OF WORCESTER.

Worcester. July 23, 1920. — October 13, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Implied. *Interest. Municipal Corporations.*

An action of contract for money had and received cannot be maintained against a municipal corporation for three per cent of an amount of money which, after it had become due to the plaintiff as the general contractor for the building of a school house, the defendant during the pendency of litigation begun by subcontractors under St. 1909, c. 514, § 23, had held on deposit in a bank account containing its general funds, receiving three per cent interest on the entire fund, where it appears that the contract between the parties provided that, if at any time there should be evidence of any lien or other claim for which, if established, the defendant "or the said premises might be liable, directly or indirectly, and which is chargeable" to the plaintiff, the defendant had the right to retain out of any payments then due or thereafter to become due to the plaintiff a sum sufficient "to completely indemnify it against any such claim," and that the contract contained no provision for the payment of interest received by the defendant upon the amount of the payments so deferred.

CONTRACT for $226.88, alleged to be money had and received by the defendant to the use and benefit of the plaintiff. Writ dated May 15, 1918.

In the Superior Court, the action was heard by *Hammond*, J., upon the pleadings and an agreed statement of facts.

It appeared that the $226.88 sought by the plaintiff was the interest which had accrued at three per cent upon $6,875.45, which, because of certain claims filed against the defendant under the provisions of St. 1909, c. 514, § 23, was being held by the defendant as security after it was due and payable to the plaintiff on account of the contract price for the building of a school house by the plaintiff for the defendant. The plaintiff in his brief before this court stated, "that this is not an action brought for 'interest' at six per cent on account of the detention of this $6,875.45, or as a penalty against the defendant for withholding it after it was due and payable to the plaintiff. It was for the increment at three per cent upon that amount while it remained as a part of the general funds of the city, upon which the city was allowed

three per cent on its deposit in a bank, until the said claims were extinguished by the plaintiff."

At the close of the evidence, the plaintiff asked for the following rulings:

"1. Upon the pleadings and the agreed statement of facts the plaintiff is entitled to recover.

"2. Upon all the evidence and the agreed statement of facts the plaintiff is entitled to recover."

The rulings were refused. The judge found for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

M. M. Taylor, for the plaintiff.

J. W. Mawbey & F. L. Riley, for the defendant.

BRALEY, J. The general rule at law is that interest is allowed upon the ground of contract either expressed or implied for its payment, or by way of damages where money is detained, or for breach in the performance of a contract where some duty has been violated. *Dodge* v. *Perkins*, 9 Pick. 368. *Donahue* v. *Partridge*, 160 Mass. 336. *Whitcomb* v. *Whitcomb*, 217 Mass. 558. While equity generally follows the law, interest occasionally is allowed in the exercise of a sound discretion. *Williams* v. *American Bank*, 4 Met. 317. *Law* v. *East India Co.* 4 Ves. Jr. 824. See *Hollister* v. *Barclay*, 11 N. H. 501. The plaintiff accordingly must show either that his contract with the city provided for interest, or the amount retained to pay the claims of lienors had been wrongfully withheld. *Burr* v. *Commonwealth*, 212 Mass. 534.

By the terms of the contract if at any time there shall be evidence of any lien or other claim for which if established the defendant "or the said premises might be liable, directly or indirectly, and which is chargeable to the contractor," the right is given to the city to retain out of any payment then due or thereafter to become due a sum sufficient "to completely indemnify it against any such claim." The defendant lawfully could hold the money represented by the checks, which, though drawn in the plaintiff's favor, had not been delivered because of the pending bill in equity, brought under St. 1909, c. 514, § 23, to enforce payment of claims for materials furnished to, and of workmen employed on the building by a subcontractor who engaged to provide and to install the heating and ventilating plant. *Tower* v.

Miller, 211 Mass. 113, 114. The claims having been adjusted and the bill dismissed, no legal advantage had accrued to either of the present parties over the other because of the litigation. *Webb Granite & Construction Co.* v. *Worcester*, 187 Mass. 385, 390, 391. And, the defendant having on the day after entry of the decree delivered to the plaintiff the checks for the unpaid balance which were accepted, it is manifest that no interest is due for the temporary detention of the money.

It is conceded in the record that during the period of litigation the defendant was credited with interest on the balance in its general account, which having included the money ultimately paid to the plaintiff, he contends that even if interest as such cannot be recovered he is entitled to his proportionate part of the increment. But the defendant was not required to keep the money coming to the plaintiff under the contract separately and the title to the deposit remained in the city which sustained no fiduciary relation whatever to the plaintiff. *Vail* v. *Durant*, 7 Allen, 408, 410. *Central National Bank* v. *Connecticut Mutual Life Ins. Co.* 104 U. S. 54. It did not unconscionably or unlawfully appropriate or retain any money of the plaintiff. See *Morse* v. *Lowell*, 7 Met. 152; *Cronan* v. *Cotting*, 104 Mass. 245; *Woodward* v. *Towne*, 127 Mass. 41; *Raphael* v. *Mullen*, 171 Mass. 111; *Furber* v. *Dane*, 204 Mass. 412.

The rights of the plaintiff as between him and the city were those of a general creditor and for the reasons stated the exceptions must be overruled.

So ordered.

DAVID ROSEN, petitioner.

Franklin. September 22, 1920. — October 13, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Exceptions: petition to establish.

While brevity is desirable in a bill of exceptions, the bill must be of such fulness as to present fairly the opinion, ruling, direction or judgment to which exception is saved, with such reference to the evidence, the issues and the course of trial as is adequate to enable this court to understand the questions

of law raised and to determine whether the alleged error of law has injuriously affected the substantial rights of the parties. Per RUGG, C. J.

At the hearing upon the allowance of a bill of exceptions, the judge suggested certain pertinent amendments of phraseology as desirable, if not essential, and, following discussions by opposing counsel directed in part to the point that the report in the bill of the evidence at the trial was too scant to make the case susceptible of being understood, the judge asked counsel for the excepting party if he wished to amend the bill, to which counsel replied: "No! . . . I'll chance it." *Held*, that under the circumstances the general rule, that proceedings for the establishment of exceptions are regarded as "*strictissimi juris*," applied with peculiar force.

In a bill purporting to state an exception, saved by the defendant at the trial, occupying parts of two days, of an action of contract, to a refusal of the trial judge to order a verdict in his favor, the only words which the defendant contended could be construed to mean that the substance of the material evidence was recited in the bill were, "The plaintiff claimed," followed by two short sentences, and "The defendant contended," followed by a single sentence. *Held*, that such expressions could not fairly be construed to signify that the parties severally introduced evidence tending to prove what the plaintiff was stated to have "claimed" and the defendant to have "contended;" and that, after the disallowance of such a bill, a petition to establish the exception must be dismissed.

A petition to establish an exception, saved by the defendant at the trial of an action of contract for compensation for services rendered, to a refusal of the trial judge to order a verdict in his favor, must be denied because the bill was not conformable to the truth, if it appears that the declaration, while setting forth a contract to pay for the services, did not state whether the contract was in writing, that the proposed bill of exceptions stated that it contained "the only evidence material to the questions raised by this bill of exceptions" and that there was omitted from the bill a statement that the ground upon which the defendant made his motion was that the statute of frauds required that it be granted as a matter of law, and a recital of evidence which warranted the leaving to the jury of the question, whether the plaintiff might not be permitted to recover from the defendant as on a *quantum meruit* the value of the services rendered although the defendant had refused to be bound by an express contract to pay therefor because such contract was not evidenced in writing as the statute required, no question as to the sufficiency of the declaration having been raised.

PETITION, filed on August 9, 1919, for the establishment of exceptions alleged to have been saved by the petitioner at the trial before *Jenney*, J., of an action of Charles Shulman against the petitioner, in which the jury found for the plaintiff, the defendant's bill of exceptions having been disallowed after hearing by the trial judge under the circumstances described in the opinion.

The defendant's proposed bill of exceptions was as follows:

"This was an action of contract brought by the plaintiff to re-

cover the wages due to him under the terms of an oral agreement entered into sometime in May, 1917, by and between the plaintiff and the defendant, whereby the plaintiff agreed to work for the defendant for a period of two years from said time and the defendant agreed to employ the plaintiff for such period. The plaintiff claimed that the defendant agreed to pay the expenses of moving him and his family to Greenfield, $35 a week, and one and one-half time for over-time. If it should develop that the plaintiff could take entire charge of the defendant's tailoring establishment, then $40 per week should be paid to him. The defendant contended that he had agreed to pay and had paid the plaintiff $18 per week. The plaintiff remained in the defendant's employ (under the terms of said agreement) until February, 1918, when he left because, as he said, the defendant refused to pay him the balance of the money his due.

"The pleadings are incorporated herein by reference, and made a part of this bill of exceptions.

"At the close of this evidence the defendant made a written motion that on all the evidence the plaintiff could not recover. The court denied the motion and the defendant duly excepted.

"The above is the only evidence material to the questions raised by this bill of exceptions.

"The jury returned a verdict for the plaintiff.

"Wherefore the defendant, being aggrieved by the refusal of the court to grant his motion for a directed verdict, now prays that his exception be allowed."

The commissioner to whom the petition was referred found that the trial of the action "was of some length, occupying a portion of two days." Other facts found by the commissioner are described in the opinion.

C. Fairhurst, (*W. A. Davenport* with him,) for the petitioner.

H. J. Field, for Shulman.

RUGG, C. J. This is a petition to establish exceptions filed in an action of contract in which the petitioner was defendant and one Shulman was plaintiff. The declaration in that action set forth a contract by Shulman with Rosen to perform labor for him for a term of two years, without averment whether the contract was in writing or not, with allegations of compensation to be paid, full performance of his agreement by Shulman and his dis-

charge by Rosen after nine months. The answer was a general denial, payment and the statute of frauds. The case was tried to a jury and resulted in a verdict for the plaintiff. The defendant seasonably filed exceptions, on which the presiding judge made this indorsement: "Disallowed after hearing." A commissioner was appointed and the case comes before us on his report.

The bill of exceptions is exceedingly short. Brevity is desirable in the statement of exceptions. *Taylor* v. *Pierce Brothers, Ltd.* 219 Mass. 187, and cases there collected. But a bill of exceptions must be of such fulness as to present fairly the opinion, ruling, direction or judgment to which exception is saved, with adequate reference to the evidence, the issues and the course of trial to enable this court to understand the questions of law raised, and to determine whether the alleged error of law has injuriously affected the substantial rights of the parties. *Freedman, petitioner,* 222 Mass. 179, 181. *Meehan, petitioner,* 208 Mass. 60, 63. *Horan, petitioner,* 207 Mass. 256.

The only exception alleged in the bill as filed is to the denial of "a written motion that on all the evidence the plaintiff could not recover." The commissioner reports that the motion presented was that "the court direct a verdict for the defendant." When this motion was presented the counsel for the defendant stated that he relied upon the statute of frauds as the ground therefor. The presiding judge replied that he should not charge the jury with reference to the statute of frauds, but no exception was taken to that ruling. No question appears to have been raised as to the sufficiency of the declaration, or as to any variance between it and the proof. No point of that nature is presented.

At the hearing upon the allowance of the bill of exceptions as filed, the presiding judge said that it was inartificially drawn, that it did not purport to state the evidence, and intimated that the substitution of the words "There was evidence tending to show" for the words "plaintiff claimed" and "defendant contended" was desirable if not essential. After discussion by counsel for each party, directed in part to the point that the report of the evidence in the bill was too scant to make the case susceptible of being understood, the judge asked counsel for the excepting party if he wished to amend the exceptions; to which the reply was, "No! . . . I'll chance it." Under these circumstances the gen-

eral rule that proceedings for the establishment of exceptions are regarded as *strictissimi juris* applies with peculiar force. *Money-weight Scale Co. petitioner*, 225 Mass. 473, 477.

The only words in the exceptions, which according to the contention of Rosen can be construed to mean that the substance of the material evidence is recited, are "The plaintiff claimed" followed by two short sentences, and "The defendant contended" followed by a single sentence. These forms of expression are commonly used to state a position taken or a line of argument adopted. They do not import a narration of evidence on which the position is rested or the argument grounded. The facts disclosed on the present record afford no justification for stretching those words to strained and unusual meanings. Such expressions cannot fairly be construed to signify that the parties severally "introduced evidence tending to show." Therefore there was no error of law in the disallowance of the exceptions.

If the case be considered more broadly, the petitioner fails to establish the truth of his exceptions. The report of the commissioner shows that there was much evidence, to which no reference is made in the exceptions, as to the current rate of wages at the time of the rendition of the plaintiff's services. That evidence, so far as appears, would not have been admissible on the theory that the case was being tried as if the declaration were on an express contract for a specified wage. Such evidence would have been entirely competent if one of the issues was whether Shulman could recover on an implied contract for the actual value of his services. The commissioner reports also that Shulman offered evidence tending to show that after performing labor for nine months he left because Rosen refused to pay him the balance of money due him. In view of all this evidence, the rule of law applicable to the rights of the parties was that if Shulman had rendered services to Rosen under an oral agreement unenforceable because within the statute of frauds, *Hill* v. *Hooper*, 1 Gray, 131, *Doyle* v. *Dixon*, 97 Mass. 208, which agreement Rosen refused in whole or in substantial part to perform, then Shulman could recover under an implied contract the value of any benefit accruing to Rosen out of the transaction and not paid for by him. *Kelley* v. *Thompson*, 181 Mass. 122, where the cases are collected. *De Montague* v. *Bacharach*, 181 Mass. 256. *Murphy* v. *O'Connell*, 218

Mass. 105. See in this connection, *Scribner* v. *Flagg Manuf. Co.* 175 Mass. 536, and *Elwell* v. *State Mutual Life Assurance Co.* 230 Mass. 248, 253. It is manifest from this evidence that the present bill of exceptions does not fairly present the question whether the judge, in view of the course of the trial, wrongly refused to direct a verdict for the defendant on the ground of the statute of frauds. The judge thought that statute had nothing to do with issues to be settled by the jury. If it had been thought or suggested that the declaration was not sufficient to permit recovery on an implied contract (a point which we do not decide), doubtless the presiding judge would have allowed an amendment to that end, as he would have had a right to do. *Bresnahan* v. *Boston Elevated Railway*, 216 Mass. 114. When it is apparent to this court that the merits of the case have been fully determined, an amendment may be allowed in order to make the pleadings conform to the issues actually tried. *Noble* v. *Brooks*, 224 Mass. 288, 292.

Petition dismissed.

HERBERT P. LITTLEJOHN *vs.* MARY J. LITTLEJOHN.

Franklin. September 22, 1920. — October 13, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Probate Court, Appeal, Motion to dismiss appeal for failure to prosecute. *Jurisdiction. Supreme Judicial Court.*

An appeal from an order, decree or denial of a Probate Court or of a judge of that court under St. 1919, c. 274, §§ 1, 2, is not pending before the full court of the Supreme Judicial Court until the papers specified in R. L. c. 157, § 21, shall have been prepared and filed in that court and the entry fee required by R. L. c. 204, § 6, has been paid.

A motion for dismissal of an appeal from a decree of the Probate Court under St. 1919, c. 274, § 1, for want of prosecution in failing to prepare and file with the full court of the Supreme Judicial Court the papers required by § 2 of that statute and by R. L. c. 157, § 21, cannot be made before the full court of the Supreme Judicial Court, but should be made in the Probate Court.

MOTION, filed with this court on September 22, 1920, for the dismissal of an appeal from a decree of the Probate Court for the county of Franklin, entered on June 15, 1920, placing the minor

child of Mary Jane Littlejohn and of Herbert P. Littlejohn in the custody of the mother and directing the father to contribute $5 each week to the child's education and maintenance "until the further order of said court," and for the affirmation of that decree.

W. A. Davenport, for the petitioner.

F. L. Greene, for the respondent.

RUGG, C. J. This is a motion made before the full court to dismiss an appeal from a decree of the Probate Court on the ground of want of prosecution in failing to have printed required papers for consideration by this court and to affirm the decree of the Probate Court. The motion is opposed on the ground that there is no jurisdiction to entertain the motion. The facts are that the petition was entered in the Probate Court on May 21, 1920, and final decree was entered on June 15, 1920. Within less than twenty days thereafter the petitioner filed in the Probate Court an appeal. He caused to be prepared and filed with the clerk of this court a single copy of the papers in the Probate Court and paid the required entry fee and did nothing more.

It is provided by St. 1919, c. 274, § 1, that "A person who is aggrieved by an order, decree or denial of a Probate Court or of a judge of that court, in any proceeding begun after this act takes effect, may, within twenty days after the entry thereof, appeal from the same to the Supreme Judicial Court, and the appeal shall be heard and determined by the full court, which shall have the like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction . . .;" and by § 2, that "The appeal shall be pending before the full court as soon as it has been filed in the Probate Court, and proper copies of papers in the proceeding, as specified in section twenty-one of chapter one hundred and fifty-seven of the Revised Laws, shall be prepared by the register and transmitted to the Supreme Judicial Court and entered in the docket of the full court." That chapter made a radical change in the practice concerning appeals from the Probate Court. Before it went into effect, appeal lay from all decrees entered by the Probate Court, with exceptions not here material, directly to the Supreme Judicial Court for the county, where a new hearing was had both upon facts and law before a single justice of this court. That no longer is the practice in view of c. 274. There is now no review of the findings of fact

made by the judge of probate except in those instances where they may be brought before the full court in accordance with equity practice as provided in § 4 of c. 274, and in those instances where issues may be framed for a jury under § 7 of that chapter. Rulings of law may be brought immediately before the full court for review. The first part of § 2 does not stand alone. It is to be read in conjunction with and as dependent upon the rest of the section and the other general provisions of law setting forth the conditions upon which causes may be brought to the consideration of the full court. The reference in § 2 of c. 274 to the copies required by R. L. c. 157, § 21, does not mean that the register must prepare them at public expense, but it means that the register shall "at the expense of the appellant" prepare and transmit to the clerk of the full court (1) one copy of the papers designated in § 21 for the use of the Chief Justice, and (2) one copy of the papers upon which the question of law arises "for each associate justice, for each party and for the reporter of decisions." See in this connection R. L. c. 159, § 19, as amended by St. 1911, c. 284, § 1. R. L. c. 173, § 117. Finally the appealing party is required by R. L. c. 204, § 6, to pay $3 for the entry of an "action or suit" in the Supreme Judicial Court and "for the entry, record and transmission of papers of each question or cause in the Supreme Judicial Court for the Commonwealth." The collocation of the words "entry, record and transmission of papers," which appears for the first time in St. 1900, c. 372, § 3, indicates that not only appeal, exceptions or report but the necessary papers and copies are essential. See *Clemens Electrical Manuf. Co.* v. *Walton*, 168 Mass. 304, 308. All these several steps must be taken before the appeal can be said to be ripe for action by the full court. It cannot be thought that the Legislature intended to place appeals from the Probate Court, now for the first time allowed directly to this court, upon a footing different from the practice prevailing as to the review of questions of law arising in other courts. On the contrary, the reference in § 2 of c. 274 to R. L. c. 157, § 21, shows that uniformity of practice is intended. The entry of an appeal from the Probate Court under St. 1919, c. 274, is the "entry of an action or suit" or "of each question or cause" within the meaning of those words in R. L. c. 204, § 6. *Burlingame* v. *Bartlett*, 161 Mass. 593, 597.

It is not contended that the appellant gave or desires to give an order for printing the record as required by R. L. c. 157, § 21.

The case at bar comes clearly within the provisions of St. 1915, c. 111, amending R. L. c. 173, § 115, wherein it is provided that if "an appellant or an excepting party or if the plaintiff in a case reported, at law, in equity or in probate proceedings, neglects to enter the appeal, exceptions or report in the Supreme Judicial Court or to take the necessary measures by ordering proper copies to be prepared or otherwise for the hearing of the case, . . . the court in which the appeal was taken or by which the exceptions were allowed or the case reported may, upon the application of the adverse party and after notice to all persons interested, order that the appeal be dismissed, the exceptions overruled or the report discharged, and that the judgment, opinion, ruling, order or decree appealed from, or excepted to, be affirmed." See R. L. c. 219, § 36. The method there provided is exclusive. The former practice of application to this court, *Gassett* v. *Cottle*, 10 Gray, 375, thereby has been abrogated. *Ingalls* v. *Ingalls*, 150 Mass. 57, 58. *Erlund* v. *Manning*, 160 Mass. 444. *Daly* v. *Foss*, 209 Mass. 470. *Carpenter* v. *Fleming*, 177 Mass. 525. *Griffin* v. *Griffin*, 222 Mass. 218. The practice set forth in *Cobb* v. *Rice*, 128 Mass. 11, no longer prevails because it rested upon a statute repealed by St. 1900, c. 372, § 1. Where a party neglects seasonably to attend to the transmission of required copies for consideration by the full court, the same procedure prevails as where in other respects there is failure to take the steps described in St. 1915, c. 111. It follows that this application should have been made in the Probate Court, and that it must be dismissed in this court.

Motion dismissed.

EARL W. DAY *vs.* JOHN McCLELLAN & others.

Worcester. September 28, 1920. — October 13, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Practice, Civil, Exceptions. *Notice. Rules of Court. Constitutional Law,* Due process of law.

If a party to an action, who has saved exceptions to rulings at the trial of the action and has filed a bill setting forth his exceptions, fails to give to the adverse party the notice in writing of the filing of the bill required by Rules 52 and 28 of the Superior Court (1915), a motion to dismiss the exceptions on that ground is correct procedure.

Rules 52 and 28 of the Superior Court (1915), requiring a notice in writing of the filing of a bill of exceptions to be given to the adverse party, is well within the power of that court and a dismissal of exceptions for want of compliance therewith violates no constitutional right of the excepting party.

Findings by a judge, who heard upon affidavits a motion to dismiss a bill of exceptions because the notice in writing of its being filed required by Rules 52 and 28 of the Superior Court (1915) was not given, will not be reversed by this court if warranted by one view of conflicting evidence.

The delivery by the party filing a bill of exceptions merely of a copy of the bill to the adverse party is not a compliance with Rules 52 and 28 of the Superior Court (1915) as to the giving of a notice in writing of the filing of the bill.

A delay of two months and sixteen days after the filing, twenty days after the trial of an action, of a bill of exceptions, in filing a motion to dismiss the exceptions for failure to give the notice in writing required by Rules 52 and 28 of the Superior Court (1915) does not constitute as a matter of law a waiver of rights under those rules.

TORT for compelling the plaintiff by duress and false imprisonment to marry against his will. Writ dated September 6, 1918.

The action was tried before *Keating,* J., by whose order the jury found for the defendants on March 26, 1919. The plaintiff filed a proposed bill of exceptions on April 15, 1919. On July 31, 1919, the defendants filed a motion to dismiss the plaintiff's exceptions on the ground that the plaintiff had given them no sufficient notice of the filing of the bill. The motion was heard by the trial judge upon affidavits. The plaintiff asked for the following rulings:

"1. As a matter of law the court has no right to dismiss a bill

of exceptions, its only jurisdiction over the same being to allow or disallow said bill of exceptions.

"2. Upon all the evidence the defendants' conduct and delay from the time said bill of exceptions was filed constituted a perfect waiver of the right to receive written notice of the filing of said bill.

"3. Upon all the evidence the defendants actually waived written notice of the filing of the bill of exceptions."

The judge refused to rule as requested, found that the plaintiff did not give to the defendants the notice of the filing of the exceptions required by the rules of the Superior Court and that the defendants did not waive the requirement of the written notice, allowed the defendants' motion and dismissed the plaintiff's exceptions. The plaintiff filed a bill, which was allowed by the judge, in which it was stated that he "duly excepted to the refusal of the court to grant his requests for rulings, duly excepted to the allowing of the defendants' motion to dismiss the plaintiff's bill of exceptions and duly excepted to all findings of the court."

M. T. Flaherty, for the plaintiff.

J. M. Thayer, F. N. Thayer & S. B. Taft, for the defendants, submitted a brief.

RUGG, C. J. This bill of exceptions relates to the action of a judge of the Superior Court in allowing a motion to dismiss a bill of exceptions, filed respecting the trial of the case on its merits, on the ground that the excepting party failed to give to the adverse party written notice of the filing of the exceptions as required by Rules 52 and 28 of the Superior Court (1915).

A motion to dismiss exceptions on that ground is correct procedure. It has been followed in so many cases without question that the practice must be treated as settled. Only a few need be cited. *Conway* v. *Callahan*, 121 Mass. 165. *Baron* v. *Fitzpatrick*, 167 Mass. 417. *Shawmut Commercial Paper Co.* v. *Brigham*, 209 Mass. 199. *Foley* v. *Talbot*, 162 Mass. 462. *Murch* v. *Clapp*, 228 Mass. 569. On reason the practice is sound. A matter on the files and yet not properly before the court ordinarily is dismissed and not considered on its merits. *DeBang* v. *Scripture*, 168 Mass. 91. *Corbett* v. *Boston & Maine Railroad*, 219 Mass. 351, 356. Cases are to be found where the exceptions have been disallowed on this ground. *Harrington* v. *Tykeson*, 182 Mass. 584. See

Doherty v. *Phoenix Ins. Co.* 224 Mass. 310, 312. Nevertheless, the usual course is to move to dismiss.

The rules of the Superior Court requiring notice in writing to the adverse party of the filing of exceptions is well within the power of that court under R. L. c. 158, § 3; c. 173, § 106, as amended. *Blair* v. *Laflin*, 127 Mass. 518.

The contention of the plaintiff that such rules of court and the practice of dismissal of exceptions for want of compliance therewith violates his constitutional rights is so plainly without foundation as to require no discussion. It is a simple rule of common sense directed to the promotion of orderly procedure and to the prevention of disputes and delays.

Whether the notice was given or not was a question of fact as to which the finding of the judge is final. *Broomfield* v. *Sheehan*, 190 Mass. 585. *Murch* v. *Clapp*, 228 Mass. 569. The giving of a copy of the exceptions is not of itself notice. *Chertok* v. *Dix*, 222 Mass. 226.

Whether there had been a waiver by the adverse parties of their right to insist upon compliance with the rules was upon this record a pure question of fact. Its determination depended upon the conflicting evidence shown in affidavits. The finding of waiver was not required as matter of law. *Chertok* v. *Dix*, 222 Mass. 226.

There was ample evidence to support all findings of fact made by the judge. There was no error of law in denying the several requests of the plaintiff for rulings of law.

Exceptions overruled.

FITCHBURG CO-OPERATIVE BANK *vs.* JOSEPH NORMANDIN & another.

Worcester. September 28, 1920. — October 13, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Mortgage, Of real estate: foreclosure. *Bills and Notes*, Payment.

Where, after an entry under R. L. c. 187, § 1, to foreclose a mortgage of real estate, no memorandum was made upon the mortgage deed and the certificate, required by § 2 of the statute to be recorded within thirty days after

the entry, was not recorded until thirty-two days after the entry, the foreclosure was ineffectual.

If, after a mortgagee of real estate, upon breach of the mortgage conditions, had made an entry for the purpose of foreclosure under R. L. c. 187, § 1, he did not make the memorandum required by § 2 of the statute, and did not record the certificate therein described until thirty-two days after the entry, but remained in possession of the land, collecting rents and profits, for more than three years, and then made another entry under § 1 of the statute, recorded the certificate required by § 2 within thirty days thereafter, and also duly sold the property in foreclosure under a power of sale contained in the mortgage for an amount which, with the rents and profits received since the first entry, was insufficient to satisfy the mortgage note, he may maintain an action for the balance still due upon the note, the first entry and possession for three years thereafter not operating to discharge the note.

CONTRACT for a balance of $1,198.03, alleged to be due upon a note, secured by a mortgage of real estate, after foreclosure of the mortgage. Writ dated March 15, 1919.

In the Superior Court the action was tried before *N. P. Brown*, J. It appeared that a certificate of the entry on July 2, 1915, to foreclose the mortgage was recorded on August 3, 1915. Other material facts and rulings by the judge are described in the opinion. By order of the judge the jury found for the defendants; and the plaintiff alleged exceptions.

E. W. Baker, for the plaintiff.

S. M. Salny, (*M. L. Lizotte* with him,) for the defendants.

BRALEY, J. The defendants mortgaged to the plaintiff a parcel of real property and, the conditions of the mortgage having been broken, the mortgagee made a peaceable entry upon the premises on July 2, 1915, for the purposes of foreclosure, and thereafter remained in uninterrupted possession for more than three years, collecting and retaining the rents and profits. But no memorandum or certificate of the entry was recorded as required by the statute. A second entry for the purpose of foreclosing the mortgage was made by the plaintiff on January 22, 1919, and the certificate required by R. L. c. 187, § 2, was duly made and recorded within thirty days after the entry. The mortgage having contained a power of sale, the mortgagee also sold the property on or about January 30, 1919, and the deed to itself, which we assume was authorized by the power, was duly recorded. The net proceeds of the sale and the net income from the rents and profits having been credited, the present action is brought to recover the unpaid balance of the

mortgage note, which was payable by instalments, all of which have matured. The defendants moved for a verdict and, the presiding judge having ruled that the failure to record the first certificate of entry within thirty days did not operate to prevent the plaintiff from acquiring title in three years therefrom and that the plaintiff did so acquire title and thereby the note declared on had been satisfied in full, ordered a verdict for the defendants and the case is before us on the plaintiff's exceptions.

We are of opinion that the ruling was wrong. The foreclosure and redemption of mortgages are regulated by statute. By R. L. c. 187, § 1, a mortgagee may, after breach of the conditions of a mortgage of land, recover possession of the premises by an open and peaceable entry on the land if not opposed by the mortgagor or any person claiming under him, and such possession so obtained, if continued peaceably for three years, shall forever foreclose the right of redemption. But by § 2 a memorandum of the entry shall be made on the mortgage deed and signed by the mortgagor or by the person claiming under him, or a certificate under oath of two competent witnesses shall be made and recorded within thirty days of the entry with certain exceptions not material in the present case, and that, unless such record is made, the entry shall not be effectual for the purposes mentioned in the preceding section. The statute not having been complied with, the first entry was not effectual to foreclose the mortgage. *Judd* v. *Tryon*, 131 Mass. 345, 346, and cases cited. *Morse* v. *Bassett*, 132 Mass. 502, 509. *Tompson* v. *Tappan*, 139 Mass. 506. *Murphy* v. *Murphy*, 145 Mass. 224, 226. *Hayden* v. *Peirce*, 165 Mass. 359, 364. If there was no completed and valid foreclosure then there was no payment of the mortgage debt to the extent of the value of the land when the entry was made. *Amory* v. *Fairbanks*, 3 Mass. 562. *Morse* v. *Merritt*, 110 Mass. 458, 460. *Dooley* v. *Potter*, 140 Mass. 49, 58, 59.

The defendants rely on *Field* v. *Gooding*, 106 Mass. 310, and *Robbins* v. *Rice*, 7 Gray, 202, 203, as authorities that under the first entry there was as between the parties an effectual foreclosure. The question in *Field* v. *Gooding* where the foreclosure was under a power of sale was whether the sale was rendered invalid because the mortgagee did not within thirty days after selling the property file a copy of the notice and his affidavit "setting forth his acts in

the premises fully and particularly, in the office of the registry of deeds in the county or district where the property is situated," as required by Gen. Sts. c. 140, § 42, now R. L. c. 187, § 15. It was held that by the sale the title of the mortgaged property vested in the mortgagee under the power, and the failure to record a copy of the notice of sale and the affidavit did not defeat the title already vested. The distinction is plain. The plaintiff could acquire no title by the first entry without compliance with the condition precedent required by the statute. *Fletcher* v. *Cary*, 103 Mass. 475, 477, 478. It was decided in *Robbins* v. *Rice* that the levy of an execution for the possession of land issued on a judgment in a writ of entry to foreclose a mortgage did not affect the rights of a purchaser for value and without notice before the execution was recorded pursuant to St. 1848, c. 144, nor affect a purchaser who after the notice had been recorded succeeded to the title of such purchaser. The decision does not support the defendants' position. The opinion, moreover, states, "If an open and peaceable entry, not opposed by the mortgagor or other person claiming under him, is made upon the mortgaged premises for the purpose of commencing the process of foreclosure of the right of redemption, it will be wholly ineffectual, unless the memorandum or certificate thereof required by law is within thirty days afterwards duly recorded in the registry of deeds for the county where the mortgage is recorded."

While a certificate of the second entry was made and recorded the foreclosure as yet has not become complete by lapse of time. The right, however, to foreclose by sale having been given by the mortgage and the power under the conditions shown appearing to have been validly exercised, the title passed to the plaintiff. *Mann* v. *Earle*, 4 Gray, 299, 300. It seems to have been uncontroverted that the value of the premises as ascertained by the sale, with the rents and profits received, did not equal the amount of the debt, and, the security being insufficient, the plaintiff can recover the balance due on the note. *Draper* v. *Mann*, 117 Mass. 439, 441.

It follows that the exceptions must be sustained.

So ordered.

WILLIAM W. KNIGHTS *vs.* TREASURER AND RECEIVER GENERAL.

Worcester. September 28, 1920. — October 13, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Mandamus. Public Officer. Practice, Civil, Amendment.

The writ of mandamus is not directed to an office, but to the person holding the office.

If, after a petition for a writ of mandamus, commanding one holding the office of Treasurer and Receiver General of the Commonwealth not to distribute and pay over certain funds received from income taxes as required by St. 1919, c. 363, has been reserved for determination by this court, the respondent resigns his office, his resignation is accepted and his successor is appointed and qualifies, a plea in abatement then filed by the respondent must be sustained, and a motion by the petitioner to amend the petition by substituting as respondent the original respondent's successor in office must be denied, the writ which the petitioner seeks to have issued being one running against the respondent personally and not against the office of which he for the time being was a representative.

While, under R. L. c. 173, § 48, it would be permissible by amendment to bring into an action a new party defendant in substitution for the one originally named as defendant, a cause of action not in existence at the time the proceedings were instituted and arising thereafter cannot thus be brought into the case.

PETITION, filed on July 21, 1920, for a writ of mandamus commanding Fred J. Burrell, then the Treasurer and Receiver General of the Commonwealth, "not to distribute or pay over in accordance with the provisions of" St. 1919, c. 363, "any portion of the tax for the year 1920 raised from the petitioner under the provisions of" St. 1916, c. 269, or of St. 1919, c. 324.

The respondent demurred on August 24, 1920, and on August 25, 1920, the case came on to be heard before *Braley*, J., upon the petition and the demurrer and by him was reserved for determination by the full court. When the case was called for hearing before the full court, the respondent filed the plea in abatement described in the opinion and the petitioner filed the motion to amend, also there described.

P. Nichols, for the petitioner.

E. H. Abbot, Jr., Assistant Attorney General, for the respondent.

RUGG, C. J. This is a petition for a writ of mandamus against the person who, at the time it was filed on July 21, 1920, held the office of Treasurer and Receiver General of the Commonwealth. In substance and effect the petition alleges that the respondent is about to, and will unless restrained by the court, pay large sums of money out of the treasury of the Commonwealth to divers cities and towns in the Commonwealth in accordance with the terms of St. 1919, c. 363, and that that statute is unconstitutional and that such payments will be in derogation of the rights of the petitioner. The case was reserved on August 25, 1920, upon the petition and demurrer for the determination of this court. When it came on to be argued at the bar, the Attorney General offered for filing a plea in abatement setting out that Fred J. Burrell, the person named as respondent in the petition, resigned from the office of Treasurer and Receiver General on September 3, 1920, and on that date ceased to be such officer. Certificate of the acting secretary under the seal of the Commonwealth to the same effect was presented to the court. The fact is as thus stated. Thereupon the petitioner offered for filing under St. 1913, c. 716, § 3, a motion to amend his petition by striking out the name of Burrell as party respondent and by substituting therefor the name of James Jackson, appointed and qualified as Treasurer and Receiver General in his stead. The Attorney General contends that as matter of law this amendment cannot be allowed. The preliminary questions thus raised must first be decided.

The office of the writ of mandamus is to compel the performance of some duty. When sought against an individual, of necessity its function is to enforce a personal obligation. If the respondent be a public officer, the duty may be purely official, nevertheless the wrong to be redressed is not one flowing from the office but from the delinquency of the person who is the incumbent of the office in refusing to perform his duty. The averments of the petition must set out that the duty exists, that it is unperformed, that there has been demand and refusal to discharge that duty, or such conduct as dispenses with such demand, and that wrong has come to the petitioner. Refusal or neglect to perform that personal duty constitutes the cause of action. The duty can exist ordinarily only so long as the person holds the office. It does not rest upon one who has been an officer after he

has retired to private life and ceased to have power to exercise the duties pertaining to the office. The writ of mandamus is not directed to an office but to the person holding the office. This is apparent, not only from the general principles governing the writ of mandamus but from the provisions of R. L. c. 192, § 5, wherein reference expressly is made to "the person who is required to appear."

It seems plain that the plea in abatement must be sustained. The person named as respondent in the original petition has ceased to hold office. If it should be held on the merits that the writ ought to issue, it could not be directed against Burrell because he no longer has capacity to perform the official duty required. He is not Treasurer and Receiver General but simply a private citizen without any official function; it cannot be directed to his successor in office because he is not a party to the proceeding and he has had no opportunity to be heard. It does not appear from the record that he would refuse to perform the duty alleged to pertain to the office, if he were asked.

The question of difficulty is whether the motion presented by the petitioner in this court to substitute Mr. Jackson, the present Treasurer and Receiver General, for the person named in the writ, can be allowed as matter of law. There is conflict of decision on the point whether such substitution can be made in the absence of an enabling statute. It was said in *Pullman Co.* v. *Croom*, 231 U. S. 571, at page 575: "The leading case upon substitution of parties in such cases is *United States* v. *Boutwell*, 17 Wall. 604, which involved the right to substitute in a suit for mandamus the successor of the Secretary of the Treasury for the one who held that office at the time the suit was commenced. Mr. Justice Strong, who delivered the opinion of the court, pointed out that the purpose of a writ of mandamus is to enforce the personal obligation of the individual, no matter how the duty arose, and that even if the party be an officer and the duty official, mandamus does not reach the office, but is directed solely to the person, who alone can be punished for failure to conform to the mandate, and the suit is therefore a personal action based upon the alleged fact that the defendant has failed to perform a personal duty. And the court concluded that, since the personal duty of the defendant lasted only so long as he occupied the

office, and as his successor was not his personal representative and could not be held responsible for his delinquencies, for the successor might have acted differently than the defendant, such action, in the absence of a statute to the contrary, must abate upon the death or retirement from office of the original defendant. This case has been uniformly followed." There are numerous decisions in the federal courts following this rule, and a few among the State courts. *United States* v. *Chandler*, 122 U. S. 643. *United States* v. *Lochren*, 164 U. S. 701. *United States* v. *Butterworth*, 169 U. S. 600. *Richardson* v. *McChesney*, 218 U. S. 487, 493. *Shaffer* v. *Howard*, 249 U. S. 200. *State* v. *Board of State Canvassers*, 32 Mont. 13. *Rains* v. *Simpson*, 50 Texas, 495, 511. *State* v. *Guthrie*, 17 Neb. 113. *State* v. *Bloxham*, 42 Fla. 501, 503. *State* v. *Long*, 174 Ind. 642. *Reeder* v. *Wexford County Treasurer*, 37 Mich. 351.

The only exception to this principle recognized by decisions of the Supreme Court of the United States has been that of "boards and bodies of a quasi-corporate character, having a continuous existence," *Pullman Co.* v. *Croom*, 231 U. S. 571, 576, 577, or where "there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached," *Thompson* v. *United States*, 103 U. S. 480, 483. *Marshall* v. *Dye*, 231 U. S. 250, 255. *Murphy* v. *Utter*, 186 U. S. 95, affirming *Utter* v. *Franklin* (by amendment after the rescript following *Utter* v. *Franklin*, 172 U. S. 416, changed to *Utter* v. *Murphy*), 7 Ariz. 300. *People* v. *Best*, 187 N. Y. 1, 5, 6. *People* v. *Ahearn*, 200 N. Y. 146. A large number of cases sometimes cited as opposed to the rule established in *United States* v. *Boutwell*, 17 Wall. 604, well may rest upon this distinction. *State's Attorney* v. *Selectmen of Branford*, 59 Conn. 402. *Shull* v. *Commissioners of Gray County*, 54 Kans. 101, 107. *Maddox* v. *Graham*, 2 Met. (Ky.) 56. *State* v. *Police Jury of Jefferson*, 39 La. Ann. 979. *Pegram* v. *County Commissioners*, 65 N. C. 114. *State* v. *Artman*, 237 Ill. 394, 399. *County Commissioners* v. *Bryson*, 13 Fla. 281, 287.

There are numerous cases which adopt the opposite view and hold that mandamus against one who has ceased to hold office either does not abate or that his successor may be substituted on

motion without an enabling statute. *Hardee* v. *Gibbs*, 50 Miss. 802, 806. *Lindsey* v. *Auditor of Kentucky*, 3 Bush, 231, 235. *State* v. *Puckett*, 7 Lea, 709, 711. *State* v. *Warner*, 55 Wis. 271, 285. *Stone* v. *Bell*, 35 Nev. 240, 244. *Nance* v. *People*, 25 Col. 252, 257. See, in this connection, cases of like nature concerning the writ of prohibition: *Commonwealth* v. *Latham*, 85 Va. 632; *Ex parte Peterson*, 33 Ala. 74, 77; *State* v. *Shea*, 28 Okla. 821, 827; *Ingersoll* v. *Buchanan*, 1 W. Va. 181.

The reasoning of *United States* v. *Boutwell*, 17 Wall. 604, and the other decisions which amplify and affirm it, seems to us sound and unanswerable.

The case at bar does not fall within the exception. The Treasurer and Receiver General is an officer of the State and not of a governmental subdivision like a city, town or county. He exercises the functions of the Commonwealth within the limitations of his office.

The Commonwealth is not directly suable in respect of the matters set forth in the petition. The State cannot be made a party defendant in its own courts except by its consent. *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137. No statute has been passed authorizing a suit against the sovereign power in an instance like the present.

No statute of this Commonwealth authorizes an amendment substituting the present Treasurer and Receiver General for his predecessor in the case at bar. Our statute as to amendments is broad. R. L. c. 173, § 48. It has been liberally construed. But amendments cannot be allowed touching the substance of the action except to enable "the plaintiff to sustain the action for the cause for which it was intended to be brought." A cause of action arising subsequent to the institution of the action is outside the scope of these words of the statute and cannot be included in the original action by amendment. It must be made the basis of a new proceeding.

It is manifest from the grounds of decision in *United States* v. *Boutwell*, 17 Wall. 604, that the cause of action set out in the petition concerns the conduct of the respondent Burrell and does not relate to any action of the present Treasurer and Receiver General. There could have been no official action by the present Treasurer and Receiver General and hence no complaint touch-

ing his conduct when the petition was filed against his predecessor in office. He was not then the holder of the office and could take no official action. Indeed, it was held by the judgment in *United States* v. *Boutwell* that an attempt by the court to bring in the successor in office of Mr. Boutwell "would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, and not that of his predecessor." Those words are equally applicable to the case at bar. While under our statute it would be permissible by amendment to bring in a new party defendant in substitution for the one originally named as defendant, *McLaughlin* v. *West End Street Railway*, 186 Mass. 150, nevertheless a cause of action not in existence at the time the proceedings were instituted, and arising thereafter, cannot be brought into the case by amendment. This is the plain effect of the words of the statute quoted above. It has been expressly so decided. *Church* v. *Boylston & Woodbury Cafe Co.* 218 Mass. 231. *Clark* v. *New England Telephone & Telegraph Co.* 229 Mass. 1, 6. The principle of adjusting in a final decree in equity all the incidental rights of the parties growing out of the original cause of action, even though in some details subsequent to the entry of the cause in court, stands on a quite different footing. *Day* v. *Mills*, 213 Mass. 585.

This conclusion is supported by another consideration. It is provided by R. L. c. 171, § 19, that "An action on a note, bond, contract or other liability made to or with the Treasurer and Receiver General, or of a county, city, town, parish or other corporation, or to or with any other public officer or trustee appointed under a statute, may, after his removal, resignation or death, be commenced or, if before commenced, may be prosecuted by his successor. . . ." This statute in substance has been in force for many years. St. 1797, c. 14. Rev. Sts. c. 13, § 24. The narrow restriction of the words of this section indicate an underlying conception of the necessity of some statute to effectuate that result and that other actions by or against public officers could not be thus prosecuted. No statute would be necessary as to actions on instruments by express terms running to a public officer and his successors in accordance with statute. *Stevens* v. *Hay*, 6 Cush. 229, 230. *Holten* v. *Cook*, 12 Mass. 574. But the case at bar is not of that nature.

However desirable it may be that a proceeding like the present be prosecuted against one who has become the successor in office of the original respondent, that result cannot be reached by judicial action but by legislation, a remedy which has been afforded in some other jurisdictions. See, for example, 30 U. S. Sts. at Large, 822; U. S. St. 1899, c. 121; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 442; Gen. Laws of R. I. 1909, c. 283, § 13; *Richmond* v. *Cole*, 41 R. I. 275.

The result is that we feel constrained to hold that the plea in abatement must be sustained and that the motion to amend must be denied.

So ordered.

GEORGE KOZA'S CASE.

Suffolk. September 16, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Injuries to which act applies. *Agency*, Scope of employment.

If an employee in the dyeing room of a textile factory, whose duty was the operation of two machines known as "jigs," after he had complained several times on different occasions to his foreman of a defective condition of ventilators in the roof which caused water to drip upon the cloth in the machines and had received assurance that the defective condition would be remedied, with a view to promoting his employer's interest but without the knowledge or permission of his foreman goes upon the roof of the room to remedy the defect and is injured by a fall while so doing, the injuries so received must be *held* not to have arisen out of or in the course of his employment.

CERTIFICATION to the Superior Court under the provisions of the workmen's compensation act of a decision of the Industrial Accident Board awarding compensation to the claimant.

A single member of the board found, with a report of the evidence, as follows:

"It is found upon the above evidence, and a view of the premises taken at the request of counsel on both sides, that the injury received by the employee on November 4, 1919, did not arise out of and in the course of his employment, and the insurer is therefore not liable for compensation.

"The claimant's work was that of a jigger, operating and tending two machines for dyeing cloth. These machines, with others, were in a room on the first floor of the subscriber's mill. On the roof of the building were a number of ventilator pipes, made of heavy sheet metal, which rose above the roof about seven or eight feet. A metal hood was on top of each pipe, made so as to swivel or turn with the wind. Their purpose and use was to supply ventilation for the room in which the dyeing machines were operated by the claimant and other employees. The dyeing room was of considerable height and at times condensed vapor or steam hung on a level with a man's head, and at certain times when the wind blew down it blew the steam still lower. Some water would drip occasionally from the ventilator pipe under which the claimant sat at times. The seat was about ten or fifteen feet away from the machine which the claimant tended, but could be moved if the claimant wished. The employee had complained to his foreman a number of times about the steam and the way the ventilators did not remove it. The foreman said it would be referred to the boss of the mechanical department, but conditions continued as above stated.

"On the morning of the accident the steam was hanging low and condensing somewhat from above. Some water dripped upon him on the seat under the ventilator pipe, not far from his machine. The claimant then left his machine and started to go up upon the roof of the building, carrying with him an oil can, to see if he could fix the ventilator which rose above the roof nearest his machine. Before leaving his machine he told a fellow employee that he was going upon the roof, but did not say why. To reach the roof he had to go up a stairway to the room over the one in which he worked. When he reached this room some carpenters were working upon the roof just outside of the window which led from the room. In stepping upon the roof the claimant fell into an opening, which was covered by a piece of tin, which the carpenters had made in the roof in connection with installing a revolving fan for drawing air into the building. When the claimant fell into the opening the fan was in motion, and he received serious and permanent injuries from which he is totally disabled. The ventilator to which the claimant intended to go to examine and fix, if he could, was at another part of the roof, a considerable

distance from the window through which he passed. The claimant had been upon the roof, near the window, before this to assist in closing the windows opening upon the roof near the place where he was injured, when violent thunder-storms occasionally came up. He had been requested to do this, only for this purpose, when his foreman, or the second or third hands were with him, and some other employees. The foreman or second or third hands would take these men up from the dye room for the purpose of closing windows. He had never gone to the roof before, other than to close the windows, and under such circumstances. At the time the employee was on the roof, and received his injury, there was no emergency affecting the business or endangering the employee, the conditions being such as occurred at times as above stated.

"It is therefore found that the work which the employee went upon the roof to do was not incidental to and did not arise out of and in the course of his employment."

On review, the full board found and ruled as follows:

"Each machine was about five feet long and the employee was obliged to stand at the side of the machines, when working. During the time the machines were running, there was steam in the room, ventilators having been installed to take this steam away. For some time prior to the day upon which the injury had occurred, these ventilators were not in good working order and the employee had on different occasions complained of this fact to his foreman, and had received assurance that the defective conditions would be remedied. On the day upon which the employee was injured, the steam hung very low in the room, at all times on a level with the employee's head, and occasionally, when the wind blew, still lower. There was a hole in the ventilator through which water was leaking down upon the employee. The ventilator was not working, and the steam was coming down and being condensed into water. At times, as the steam condensed and turned into water, it dripped from the water pipes on to the cloth while in the process of dyeing. Because of the conditions brought about by the defective ventilator and their effect upon the work of dyeing and upon the employee himself, and in the hope of alleviating conditions concerning which he had frequently complained, Koza went upon the roof where the ventilator was located with that purpose in view. His act and the purpose which moved him were

so intimately connected with his employment conditions, that the resulting injury rightfully may be held to be within the scope of his employment relation and to have occurred in the course of and to have arisen out of such employment."

In the Superior Court by order of *Wait*, J., a decree was entered in accordance with the decision of the Industrial Accident Board. The insurer appealed.

The case was submitted on briefs.

G. Gleason, for the insurer.

P. L. Keenan, for the employee.

CARROLL, J. The employee operated two dyeing machines known as "jigs." In the dyeing room where he was employed there was a large amount of steam, and at times water would drip from the ventilator pipe. He complained to his foreman that the ventilators were not working properly and the foreman promised to have them repaired. The employee testified that on the morning of November 4, 1919, because of a defect in the ventilator "steam was coming down on him and condensing into water," and "water was dripping from above." Without the knowledge of the employer, he went from the dyeing room to the roof of the building for the purpose of repairing the ventilator; a few feet from the window by which he came to the roof, there was a hole through which he fell onto a revolving fan, and was severely injured.

It was no part of the employee's occupation to repair the ventilator. Before the day of his injury he had never attempted this work, and without the knowledge or permission of his foreman, and without any express or implied authority from his employer, although seeking to promote its interest, he engaged in an undertaking which was not within the scope of his employment, and could not be found to arise out of it, or in its course. The case is governed by *Borin's Case*, 227 Mass. 452, *Bolden's Case*, 235 Mass. 289, *Rochford's Case*, 234 Mass. 93.

The decree of the Superior Court is to be reversed and a decree is to be entered for the insurer.

So ordered.

ADOLPH KOSKI *vs.* ARTHUR M. HASKINS.

Franklin. September 22, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Conversion. Evidence, Of ownership, Relevancy and materiality, Of value. *Damages,* In tort. *Warehouseman. Officer.*

At the trial of an action of tort against a deputy sheriff for the conversion of onions which he had attached upon a writ in an action against a third party, evidence is not admissible of statements made by that third party, not in the presence of the plaintiff, tending to show that he owned the onions.

At the trial of the action above described, testimony of the defendant, called by the plaintiff, that, as deputy sheriff, he had sold the onions six days after the attachment, was admissible; testimony by him that, shortly before the sale, a demand was made upon him for the onions by the plaintiff's attorney, although admissible in the discretion of the trial judge, was immaterial, as proof of a demand after the attachment was not essential to the maintenance of the action; and evidence of the price at which the onions were sold at the sale six days after the attachment was competent as bearing upon the market value of the onions at the time of their attachment.

At the trial of an action of tort for conversion against a deputy sheriff, who had attached, in an action against a third person, onions of which the plaintiff claimed ownership and which, when attached, were stored in a warehouse, testimony by the warehouseman is admissible, independently of entries in his books, if he kept any, that the plaintiff had made the arrangements with him for the storage of the onions.

The measure of damages to be awarded to the plaintiff in an action against a deputy sheriff for an unlawful attachment of onions of the plaintiff upon a writ in an action against a third person is the value of the onions at the time of the attachment, although six days after the attachment and after the plaintiff had demanded the onions of him the defendant sold the onions as perishable property for a price greater than their value at the time of the attachment.

TORT against a deputy sheriff for the conversion of onions. Writ dated August 2, 1919.

In the Superior Court the action was tried before *Callahan,* J. Material evidence and exceptions saved by the parties are described in the opinion. There was a verdict for the plaintiff in the sum of $1,822.39; and both parties alleged exceptions.

H. E. Ward, for the plaintiff.

W. A. Davenport, (*C. Fairhurst* with him,) for the defendant.

CROSBY, J. This is an action of tort for the conversion of five

hundred and seventy-two cases or bags of onions. The property was attached by the defendant, a deputy sheriff, on February 27 and February 28, 1919, on two writs in actions against Stanley Puhelski alias Pokolski, and, because of the perishable nature of the onions, they were duly sold by the officer on March 5, 1919. The action was tried before a judge of the Superior Court with a jury, and a verdict returned for the plaintiff in the sum of $1,822.39.

The case is before us on exceptions taken by the plaintiff and by the defendant to the admission and exclusion of testimony, and to certain rulings and refusals to rule by the trial judge. The evidence was conflicting as to the ownership of the property attached; that offered by the defendant, if believed, would have warranted the jury in finding that it belonged to Pokolski; but they were not bound to believe that testimony. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. *Cohen* v. *Longarini*, 207 Mass. 556, 558.

The defendant offered to show that, before the attachments were made, Pokolski had made statements to the effect that he was the owner of the onions, that he had attempted to sell some of them, and that he kept them in the place where they were stored in his brother's name because he was afraid they would be attached by a creditor. These, and other statements alleged to have been made by him, were not claimed to have been made in the presence of the plaintiff, and were rightly excluded; Pokolski was not a party to the action, his declarations were those of a third person, and the plaintiff was not bound by them. *O'Brine* v. *McNulty*, 122 Mass. 474. *Oberlander* v. *Carstens*, 151 Mass. 18. *Rice* v. *James*, 193 Mass. 458, 463.

The testimony of the defendant, called to testify by the plaintiff, that as deputy sheriff he sold the onions, was properly admitted; the exception thereto is overruled.

His testimony that a demand was made by the plaintiff's attorney upon him for the onions shortly before the sale, although admissible in the discretion of the judge, was immaterial, as no demand was necessary.

There was evidence of the market value of the onions on the dates on which they were attached; and it appeared that between that time and March 5, 1919, when they were sold at auction,

the market price fluctuated and materially increased. The court admitted, subject to the defendant's exception, the amount received for the onions at the sale, which was $2,260, a sum in excess of the verdict. This evidence, although not conclusive, was competent, as bearing upon the market value at the time of the attachment, and the jury were so instructed. *Kent* v. *Whitney*, 9 Allen, 62. *Baker* v. *Seavey*, 163 Mass. 522, 528. *Atherton* v. *Emerson*, 199 Mass. 199, 210.

When attached, the property was stored upon the premises of one Barowski. He was allowed to testify, subject to the defendant's exception, that the plaintiff had made arrangements with him for such storage. The contention of the defendant is that the onions were stored in a warehouse maintained by Barowski, and that, as warehouseman, his books were the best evidence as to who made arrangements for the storage. This evidence was admissible independently of the entries in Barowski's books, if he kept any, which did not appear. Accordingly the exception cannot be sustained. As none of the exceptions taken by the defendant disclose any error, they must be overruled.

The single question raised by the plaintiff's exceptions relates to damages only. He requested a ruling that the measure of damages was the fair market value of the onions on March 5, 1919; the court refused to so rule and instructed the jury that the measure of damages was the fair market value of the onions at the time they were attached by the defendant on February 27 and 28, 1919, with interest thereon from those dates; that in determining such value they should take into consideration the condition of the market between February 27 and March 5 inclusive, and the price for which the onions were sold on the last named date. The instructions given were correct. The rule is well settled that the measure of damages in an action for conversion is the market value of the property at the time of the conversion, and interest from that time. *Kennedy* v. *Whitwell*, 4 Pick. 466. *Parks* v. *Boston*, 15 Pick. 198. *Johnson* v. *Sumner*, 1 Met. 172, 179. *Clapp* v. *Thomas*, 7 Allen, 188. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 41. *Pierce* v. *O'Brien*, 189 Mass. 58. *Bailey* v. *Agawam National Bank*, 190 Mass. 20.

The plaintiff contends that, although the property had been attached by the defendant and was in his hands, his refusal to

deliver it to the plaintiff after demand and its subsequent sale amount to a present conversion, and that he is entitled to rely on that conversion as the time when his damages accrued. We are unable to agree with this contention. The act of the defendant in attaching the property and taking possession of it was an exercise of dominion and control which made him liable without any demand for its return. *Pierce* v. *Benjamin*, 14 Pick. 356, 360. *Baker* v. *Lothrop*, 155 Mass. 376. *Robinson* v. *Way*, 163 Mass. 212. It was said by Mr. Justice Devens, in *Edmunds* v. *Hill*, 133 Mass. 445, at page 446: "Demand and refusal are never necessary, except as furnishing evidence of an unlawful taking or detention against the rights of the true owner, in an action of replevin, or of an unlawful conversion, in an action of trover."

Whatever may be the rule in some jurisdictions, it is well settled in this Commonwealth that although the market value of property attached fluctuated and increased in value between the dates of its attachment and sale, that does not entitle the plaintiff to recover the increased price in a case of this kind, but that the market value at the date of the attachment, with interest, is the measure of damages. *Kennedy* v. *Whitwell*, *supra*. *Pierce* v. *Benjamin*, *supra*. *Stone* v. *Codman*, 15 Pick. 297. *East Tennessee Land Co.* v. *Leeson*, *supra*. *Bailey* v. *Agawam National Bank*, *supra*.

The cases cited by the plaintiff do not sustain his contention, but are distinguishable in their facts, or in the remedy sought to be enforced. See *Henshaw* v. *Bank of Bellows Falls*, 10 Gray, 568; *Fisher* v. *Brown*, 104 Mass. 259; *Fowle* v. *Ward*, 113 Mass. 548; *Hayward* v. *Leeson*, 176 Mass. 310.

It results that both the plaintiff's and the defendant's exceptions must be overruled.

So ordered.

ARSENE GODIN *vs.* HENRY C. NIEBUHR.

Hampden. September 23, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Unlawful Interference. Damages, In tort.

The harmful circulation of libellous statements for the purpose of injuring the business of another is an unlawful interference with such other person's property rights for which the wrongdoer is answerable in an action of tort.

The handing out to passers-by in front of a barber shop by the business agent and secretary of a local barber's union of printed cards stating that the proprietor was "Unfair to Organized Labor. He refuses to employ Union Barbers or conduct a Union Barber Shop," where it appears that, of three employees in the shop, two were members of the union in good standing and the third had a union book, duly stamped, showing receipt of dues, but, under some alleged law of the international union, not known to the proprietor of the shop, was, in the opinion of the business agent and secretary, "readmitted" at a wrong local union, may be found to be an unlawful and unjustifiable interference with the business of the proprietor of the shop for which an action of tort may be maintained.

At the trial of an action brought under the circumstances above described, the plaintiff testified that the distribution of the cards hurt his business, that because of them people that used to patronize him stayed away and that the damage he sustained thereby was about $800 or $900. There was no evidence indicating his weekly earnings nor showing how he sustained the damages to which he testified nor how an estimate of his damages could be made, nor the names or identity of customers who refrained from patronizing the shop. The jury found for the plaintiff in the sum of $220, and the judge reported the case for determination by this court. *Held,* that

(1) For the invasion of his rights the plaintiff was entitled to at least nominal damages;

(2) There was evidence of specific damages;

(3) The jury might well have inferred that the intended and natural result of the defendant's wrongdoing was substantially to injure the plaintiff's business.

TORT, with a declaration containing a third count based upon an unlawful interference with the plaintiff's business as the proprietor of a barber shop. Writ dated November 16, 1915.

In the Superior Court the action was tried before *Irwin,* J. The material evidence on the question of liability is described in the opinion. It was stated in the report by the trial judge that the plaintiff testified in direct examination, on the question of damages, "That because of the distribution of the cards customers were kept away. That distribution of the cards hurt his

business. That people remained or stayed away that used to patronize him because of these cards. That the damage he sustained thereby was about $800 or $900. . . . There was no testimony indicating the weekly earnings of the plaintiff in his business after the trouble began, nor showing how the plaintiff sustained the damage of $800 or $900, and there was no evidence from which an estimate of the damage alleged to have been sustained could be made. There was no evidence of the names or identity of any customers who refrained from patronizing the plaintiff's shop as a result of the distribution of the cards, nor any evidence, other than that of the plaintiff which herebefore appears, that any customers refrained from patronizing the plaintiff as a result of the distribution of cards by the defendant or by any other person, or that if he lost any customers they refrained from patronizing him because the defendant made such distribution, or some other person."

The jury found for the plaintiff on the third count of the declaration in the sum of $220, and the judge thereupon ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the evidence warranted the finding for the plaintiff, it was to stand; otherwise, judgment was to be entered on the verdict ordered for the defendant.

The case was submitted on briefs.

C. L. Young, for the plaintiff.

G. D. Cummings, G. F. Leary & P. E. Tierney, for the defendant.

De Courcy, J. The right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the State. See *L. D. Willcutt & Sons Co.* v. *Driscoll*, 200 Mass. 110, 117. One who interferes with another's business, for the purpose of compelling present or prospective customers to withhold their patronage, is responsible for the harmful consequences, unless he shows a legal justification for such interference. And to constitute such justification, it must appear not only that the interference was in pursuance of a lawful purpose, like trade competition, but that it was carried on by lawful means. The harmful circulation of libellous statements for the purpose of injuring the business of another, is a malicious interference with that other's property rights, for which the wrongdoer is answerable in damages. *M. Steinert & Sons Co.* v. *Tagen*, 207

Mass. 394. *Burnham* v. *Dowd*, 217 Mass. 351. *Harvey* v. *Chapman*, 226 Mass. 191. L. R. A. 1917 E 391, note. *Martineau* v. *Foley*, 231 Mass. 220. 1 L. R. A. (N. S.) 1149, note.

These established principles are applicable to the facts disclosed by this record. The plaintiff conducted a barber shop and pool room in Springfield. On Saturday preceding Memorial Day, 1915, the defendant, in front of the plaintiff's shop, handed to numerous passers-by certain cards, on which was printed the following:

"ARSENE GODIN'S BARBER SHOP
and Pool Room, 227 Main Street
Are Unfair to Organized Labor.
He refuses to employ Union Barbers
or conduct a Union Barber Shop."

The meagre record does not disclose the purpose which actuated the defendant. We infer that he was acting on behalf of the local barbers' union, of which he was business agent and secretary. What trade dispute there was, if any, between the plaintiff and the union, is left largely to conjecture.

However, the main question is, whether there was evidence warranting a verdict for the plaintiff on the third count; and even if we assume that the defendant's purpose was a lawful one, nevertheless there was evidence for the jury that the means he employed were unlawful. The statements printed on the cards, as above set forth (for we need not consider the other circulars referring to shop cards), might well be found to be false and malicious. It appears that in truth the shop was conducted under union regulations. It is not denied that two of the three employees were members of the union in good standing. Apparently the defendant claimed that the third employee, Sheltra, under some alleged law of the international union, "should have been readmitted at Springfield, instead of Portland, Maine." Sheltra had a union book, duly stamped, showing receipt of dues. If there was any question in the union as to his good standing, there is no evidence that the plaintiff was informed of it, or was requested to discharge Sheltra. In short, the jury could find that the cards circulated by the defendant for the purpose of injuring the plaintiff's business, were libellous statements and hence without legal justification.

The evidence as to damages was scanty and indefinite; but this was partially due to the practical difficulty of showing what customers refrained from patronizing the plaintiff in consequence of the cards distributed by the defendant. For the invasion of his legal rights the plaintiff was entitled to at least nominal damages. And the jury not only had evidence of specific damage, but might well infer that the intended and natural result of the defendant's wrongdoing was to substantially injure the plaintiff's business. It is to be presumed that this issue was presented to the jury with proper instructions. *Burnham* v. *Dowd*, 217 Mass. 351, 360. *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* [1896] 1 Q. B. 147.

It may be added that the "peaceful persuasion" act (St. 1913, c. 690), does not purport to excuse unlawful conduct, such as the publication of libellous matter coercive in its nature.

In accordance with the report, the verdict for the plaintiff is to stand; and it is

So ordered.

ALICE R. KERR *vs.* JAMES H. KERR.

Hampden. September 23, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Marriage and Divorce. Husband and Wife. Contract, Construction. *Probate Court. Superior Court.*

A husband and a wife, while a decree of a Probate Court under R. L. c. 153, § 33, was in force ordering the husband to pay $7 weekly to the wife for her support and the maintenance of the minor child of the parties until further order of that court, entered into a contract with a trustee which, among other things, provided that the husband should pay $1,000 in settlement of the separate maintenance suit, and that sum was paid. Later the wife brought a libel for divorce and sought alimony and an allowance on behalf of the minor child. The judge who heard the libel ordered a decree *nisi* and ruled that the agreement was a bar to a claim by the wife for alimony or on behalf of the child. The libellant alleged exceptions. *Held*, that

(1) The contract must be construed as being intended only to settle the husband's legal obligations while the marriage relation existed, and that it did not have divorce in view;

(2) The power of the Superior Court upon granting the divorce also to make a decree for alimony and for suitable provision for the minor child was not abrogated by the agreement;

(3) The question, *whether* the power of the Probate Court to increase the allowance it had decreed to the wife and child if, in circumstances arising after the decree, such sum became inadequate for their maintenance was limited by the contract of the parties with the trustee, not being raised by the record, was not considered.

To what extent a contract of a husband and his wife with a trustee, which purported to provide for alimony to be paid to the wife in the event of a divorce afterwards being procured by her and which was made without the sanction of the court, might affect the power of the court to award alimony in such subsequent divorce suit, was not determined, the contract in question in this case contemplating the relations of the parties only during the continuance of the marriage relation.

LIBEL FOR DIVORCE, filed on April 29, 1919, alleging desertion and adultery.

The libel was heard by *N. P. Brown*, J. Material facts found by him are described in the opinion.

The libellant asked for a ruling as a matter of law, that the agreement signed by the libellant with James W. Moore as trustee, and described in the opinion, "was not a bar to the court awarding alimony to the libellant." The ruling was refused. The libellee asked for a ruling that "there should be no alimony or support for the child awarded as the release is a bar to any claim by the wife or on behalf of the child," and the judge so ruled. To these rulings the libellant saved exceptions.

Although the exceptions were pending, a decree *nisi* was entered, granting the divorce on the ground of desertion and including no order as to alimony or allowance for support of the minor child of the parties; and the libellant alleged exceptions.

The case was submitted on briefs.

D. E. Webster, for the libellant.

R. J. Morrissey & J. L. Gray, for the libellee.

DE COURCY, J. The trial judge granted a divorce on the ground of desertion. As he had no power to enter a decree while exceptions were pending, we treat the entry of May 7, 1920, as an order for a decree. *Young* v. *Reynolds*, 218 Mass. 129, 132. *Friedrich* v. *Friedrich*, 230 Mass. 59, 61.

At the hearing it appeared that in December, 1908, on a petition by Mrs. Kerr for separate support, the Probate Court found that she was living apart from her husband for justifiable cause; prohibited said James H. Kerr from imposing any restraint on her personal liberty; gave to her the care and custody of their minor child, then only two years old; and ordered him to pay her

the sum of $100 and a further weekly sum of $7 for her support and the maintenance of their minor child "until the further order of said court." It further appeared that on July 1, 1909, these parties, through one Moore as trustee, entered into a written agreement by which Kerr was to pay the trustee the sum of $1,000 in settlement of the separate maintenance suit, then pending in the Superior Court; and that said money was so paid. At the time of the divorce hearing the libellant was entirely without means, and dependent for her support and that of the minor child (now about thirteen years of age), upon her own small earnings of $11 a week, or less. The exceptions raise the question whether the judge was right in ruling that the agreement of July 1, 1909, is a bar to any claim of alimony by the libellant or on behalf of the child.

The statute empowered the Probate Court to revise or alter the decree of December, 1908, or make a new one, from time to time, "as the circumstances of the parents or the benefit of the children may require." R. L. c. 153, § 33. This decree remained in effect notwithstanding the appeal to the Superior Court, R. L. c. 162, § 19, and admittedly was in full force at the time of the divorce hearing. The agreement of July 1, 1909, by its express terms was made in "settlement" of that suit. Like the decree itself, it contemplated the continuance of the marriage status. As we construe the agreement, considering it as a whole and in the light of the circumstances in which it was executed, we are of opinion that the parties, in substituting a sum in gross for the weekly payments ordered by the Probate Court, intended to settle Kerr's legal obligations, merely while the relation of husband and wife should exist. They did not have divorce in view, nor purport to make provision for the wife and child in the event that Kerr's legal obligation as husband should be thus terminated.

It is generally held that a duly executed separation agreement, where the husband and wife are living apart or about to separate, is valid and enforceable provided it was fairly made. *Bailey* v. *Dillon*, 186 Mass. 244. *Terkelsen* v. *Peterson*, 216 Mass. 531. The purpose and effect of the agreement in controversy expired when the divorce was granted. The question whether the power of the Probate Court to increase the allowance decreed for the wife and child in 1908 was limited thereby, in the event of the sum ordered

becoming inadequate for their maintenance since that time, has not arisen. And as the agreement was not one attempting to provide for alimony, we need not determine to what extent an agreement of that nature made between the parties without the sanction of the court, would affect the power of the court to award alimony in a subsequent divorce suit. While the court undoubtedly would give due consideration to such contracts when not tainted with fraud, coercion or collusion, its powers and duties are not abrogated by agreements made without its sanction. Under our statutes the power of the Superior Court to make and revise decrees for alimony for the wife and child is a broad one. R. L. c. 152, §§ 30–33.

And even if the libellee's contention, that the agreement in question included a settlement of alimony, were correct, plainly the Superior Court would not be concluded thereby from making suitable provision for the minor child. Whatever the effect of such an agreement might be on the property rights of the wife, James H. Kerr could not relieve himself from legal liability for the suitable support of his child by the assent of the wife to an agreement so wholly inadequate. See *Albee* v. *Wyman*, 10 Gray, 222; *Chapin* v. *Chapin*, 135 Mass. 393; *Ham* v. *Twombly*, 181 Mass. 170; *Wolkovisky* v. *Rapaport*, 216 Mass. 48; *McConnell* v. *McConnell*, 98 Ark. 193; *Pereira* v. *Pereira*, 156 Cal. 1; *Seeley's Appeal*, 56 Conn. 202; *Wilson* v. *Wilson*, 40 Iowa, 230; *Carey* v. *Mackey*, 82 Maine, 516; *Galusha* v. *Galusha*, 116 N. Y. 635; cases cited in 1 R. C. L., Alimony, § 73, 9 R. C. L., Divorce & Separation, § 356, and in 19 C. J., Divorce, § 523.

The ruling of the court was erroneous, and the entry must be

Exceptions sustained.

JOHN J. CURRAN *vs.* TERRENCE O'DONNELL.

Hampden. September 23, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, What constitutes, Novation. *Frauds, Statute of.*

In an action of contract, it appeared that the owner of certain property employed the plaintiff to find a purchaser of the property for him, that, after extended negotiations with the defendant, an offer by the owner to sell the property for a certain price was transmitted to the defendant by the plaintiff and was accepted, that the plaintiff was to be paid one third of the purchase price, that the owner's offer was accepted by the defendant at a meeting of the three and at that time the plaintiff agreed to release the owner from his claim for services and commission in consideration of the defendant's promise to pay it, and that the defendant so agreed with the plaintiff, who released the owner, the owner stating that the arrangement was satisfactory to him. The sale never was consummated. *Held*, that

(1) The promise by the defendant was for a consideration;

(2) By the agreement of the three parties, a novation was effected by which the owner was discharged from liability to the plaintiff and the defendant by his promise was substituted as the plaintiff's debtor;

(3) The contract was not subject to the provisions of the statute of frauds;

(4) The plaintiff was entitled to recover.

TORT with a declaration in two counts. Writ dated October 29, 1917.

In the first count of the declaration, the plaintiff alleged "that one Wilfred J. Beaudry was indebted to him in the sum of $233.33, as a commission for, or for services in, procuring the defendant as a customer for the purchase of certain property of said Beaudry; that the defendant, in consideration that the plaintiff would release said Beaudry from said indebtedness, promised and agreed with the plaintiff to pay him said sum of $233.33, in which agreement said Beaudry joined and in consequence of said promise and agreement the plaintiff did release said Beaudry from said indebtedness, and by reason of all of which the defendant became indebted to and owes the plaintiff said sum of $233.33, which sum said defendant has failed and neglected to pay to the plaintiff, although often requested by the plaintiff so to do." The

second count was for money had and received by the defendant to the plaintiff's use.

The action was tried before *O'Connell*, J. Material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant and reported the case to this court for determination, judgment to be entered upon the verdict if his ruling was correct, and, if the case should have been submitted to the jury, judgment to be entered for the plaintiff in the sum of $233.33 and costs.

T. D. O'Brien, for the plaintiff, submitted the case on a brief.

E. A. Lynch & F. J. O'Neil, for the defendant, submitted the case without argument or brief.

CROSBY, J. This is an action of contract brought to recover a commission for, or services in, procuring the defendant as a customer for the purchase of certain property of one Beaudry. There was evidence to warrant a finding of the following facts: that Beaudry employed the plaintiff to find a purchaser for the property; that after different terms of sale had been submitted by the plaintiff to the defendant, extending over a period of several months, an offer of sale was finally made at the direction of Beaudry, by the terms of which the latter agreed to accept $700 for his interest in the real and personal estate so offered for sale; that this offer was accepted by the defendant; that the plaintiff was to be paid one third of the purchase price, or $233.33; that at the time the offer was accepted, Beaudry, the defendant and the plaintiff met, and the plaintiff agreed to release Beaudry from his claim for commission and services in consideration of the defendant's promise to pay it; that the defendant agreed to pay the plaintiff, and the latter released Beaudry, who stated that the arrangement was satisfactory to him.

If the jury believed the foregoing evidence, the plaintiff was entitled to recover the amount due him from the defendant. The promise of the defendant was for a consideration. It was a promise to pay to the plaintiff the defendant's own debt which grew out of the transaction, and not the debt of another, for the debt of Beaudry to the plaintiff had then been extinguished by the mutual agreement of the parties; accordingly it was not within the statute of frauds. By agreement of all parties, there was a novation by the terms of which Beaudry was discharged from

liability and the defendant by his promise was substituted as the plaintiff's debtor. *Caswell* v. *Fellows*, 110 Mass. 52. *Eden* v. *Chaffee*, 160 Mass. 225. *Trudeau* v. *Poutre*, 165 Mass. 81, 86. *Griffin* v. *Cunningham*, 183 Mass. 505. The circumstance that the sale from Beaudry to the defendant was never consummated does not affect the rights of the plaintiff, whose contract under the terms of the employment, as the jury could have found, was merely to procure a customer for the purchase of the property, and not to effect a completed sale. *Fitzpatrick* v. *Gilson*, 176 Mass. 477. *Willard* v. *Wright*, 203 Mass. 406, 409.

In accordance with the terms of the report, the verdict ordered for the defendant is set aside, and judgment is to be entered for the plaintiff "for $233.33 and costs."

So ordered.

WALTER B. CLAYTON *vs.* HOLYOKE STREET RAILWAY COMPANY.
HENRY S. ELY *vs.* SAME.

Hampden. September 23, 1920. — October 14, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, & JENNEY, JJ.

Negligence, Street railway, In use of highway, Contributory. *Proximate Cause*. *Practice, Civil*, Judge's charge, Exceptions.

At the trial of an action of tort against a street railway company for personal injuries received in a collision of a motor car, which the plaintiff was driving, with an electric street car of the defendant at the intersection of streets in a thickly settled district of a city, there was evidence tending to show that the street car with a dim headlight was approaching the intersection of the streets at about nine o'clock at night in December, that it was running at the rate of from forty to fifty miles an hour and that no signal or warning of its approach was given; that the plaintiff approached the intersection of the streets from the motorman's right and, shortly before reaching it, stopped where he supposed a person riding with him lived, that, before proceeding, he sounded his horn and looked up and down the intersecting street and listened and neither saw nor heard any street car or other vehicle approaching, and that when he reached the street car track he was travelling at the rate of six miles an hour; that after the collision the street car jumped the track, ran against a hydrant and turned completely around, while the motor car was driven one hundred and sixty-five feet by the force of the collision. The jury viewed the scene of the accident. *Held*, that

(1) There was evidence of negligence of the defendant's motorman;

(2) It could not be said as a matter of law that the plaintiff was negligent.

TWO ACTIONS OF TORT, the first for personal injuries and the second for damage to a motor car resulting from a collision of the motor car, when being driven by the plaintiff in the first action, with an electric street car of the defendant at about nine o'clock at night on December 17, 1915, at the intersection of Hampden Street and Pine Street in Holyoke. Writs dated April 21 and July 2, 1917.

In the Superior Court the actions were tried together before *Irwin*, J. The material evidence and exceptions saved by the defendant are described in the opinion. The portion of the charge of the judge, referred to in the opinion as objected to in this court but not specifically called to the attention of the judge nor excepted to at the trial in the Superior Court, was as follows:

"Now, a person does his full measure of duty when he puts himself under the care of skilful persons to look after him during his convalescence period, and what happens to him as a natural consequence of the treatment that is being received at the hands of skilful physicians and surgeons is deemed to be the proximate cause [result] of his injury. Now, it isn't the direct cause [result] because the direct injury that he received was the result of the collision. And this breaking of the bone of the leg the second time, by falling in the hospital, is deemed to be, in the eyes of the law, a natural sequence of the situation that was created by the wrongful conduct of the defendant, and he is liable for it. It isn't a thing that ordinarily would follow in the natural course of events, but it followed as a consequence of the condition that was created by the act of the defendant, and the responsibility for that is placed upon the defendant, and not upon the injured person. Quite a recent case of that kind was in our own court . . . [Here the judge read from the opinion in *Hartnett* v. *Tripp*, 231 Mass. 382, at page 385, and continued] . . . "And I so instruct you here in this case: that is, what befell Clayton in the hospital must be found, in order to hold the defendant liable for it, to be the proximate, the nearby, the necessary thing to do under the circumstances. In determining that you may consider whether or not he was following the directions of his surgeon. Did . . . [the attending physician] . . . say that he had permitted or allowed or advised or directed that he get about the hospital?"

The jury found for the plaintiff in the first action in the sum of $3,500; and for the plaintiff in the second action in the sum of $1,050; and the defendant alleged exceptions.

J. P. Kirby, (*D. H. Keedy* with him,) for the defendant.

R. P. Stapleton, (*F. J. McKay & R. A. Allyn* with him,) for the plaintiffs.

DE COURCY, J. These two actions, tried together, are for personal injuries and property damage growing out of a collision between an electric car and an automobile, at the intersection of Hampden and Pine streets in Holyoke.

The first exception is to the judge's denial of the defendant's motion for a directed verdict. There was ample evidence of the motorman's negligence. It could be found that the electric car, with a dim headlight, was proceeding easterly on Hampden Street; that when it approached Pine Street, in a thickly settled district, it was running at from forty to fifty miles an hour, and that no gong or whistle was sounded. The car jumped the track after the collision, ran against a hydrant on the sidewalk, and turned completely around; and the automobile was driven by the force of the collision a distance of one hundred and sixty-five feet. The due care of Clayton (herein referred to as the plaintiff) was also for the jury. They could find on the evidence that he came northerly along Pine Street, and stopped a short distance from Hampden Street, where he mistakenly supposed his passengers lived; that before proceeding to cross Hampden Street he sounded his horn, looked up and down that street and saw no car, and listened for the approach of cars or other vehicles but heard none; and that when he reached the track he was travelling only six miles an hour. The jury viewed the premises, and observed to what extent his view toward the west would be obstructed by buildings, trees and poles. It was for them to determine when this swiftly moving car would come into view from Pine Street, and whether the plaintiff, in the exercise of due diligence for his safety, could and should have seen it in time to avoid the collision. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. *Halloran* v. *Worcester Consolidated Street Railway*, 192 Mass. 104. *Robinson* v. *Springfield Street Railway*, 211 Mass. 483, and cases cited. *Gagnon* v. *Worcester Consolidated Street Railway*, 231 Mass. 160.

There was no error in the judge's refusal to instruct the jury

that "There is no evidence that the plaintiff's fall in the hospital, some eight or nine weeks after the collision, was the natural and proximate result of his original injury and the plaintiff can recover no damages on account of any injury he may have received from his fall." The testimony of the plaintiff and the physician, although meagre, warranted the jury in finding that while Clayton was attempting with the aid of crutches to walk in the hospital he slipped on the floor and fell, — thereby fracturing his leg a second time. *Hartnett* v. *Tripp*, 231 Mass. 382, and cases cited.

The defendant also argues that the judge in the course of his charge erroneously told the jury, in effect, that the defendant was responsible for the second fracture, as matter of law. While this portion of the charge is open to criticism, the defendant's counsel did not except to it at the trial, and cannot avail of it now. If he had called the erroneous statements to the attention of the judge, it is fair to assume that they would have been corrected. Indeed the jury were charged, as requested by the defendant, that "The burden of proof is upon the plaintiff to prove that his fall in the hospital was the natural and proximate result of his injury occasioned by the collision with the street car, and not the result of a separate, independent and intervening act for which the defendant is in no way responsible."

Exceptions overruled.

EARL W. DAY *vs.* MARGARET E. DAY.

Worcester. September 27, 1920. — October 15, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Marriage and Divorce, Annulment. *Duress.*

At the hearing of a libel for annulment of a marriage on the ground that it was procured by duress and false imprisonment of the libellant while he was under arrest charged with getting the libellee with child, the evidence warranted findings that the libellant, while under arrest and represented by counsel, after he had pleaded "not guilty," voluntarily changed his plea to "nolo contendere," which the presiding judge accepted, and that without coercion or fraud the libellant married the libellee, remaining in the custody of the arresting officer until the ceremony was performed and then being released, the complaint against him being placed on file upon the payment by him of certain expenses

of the prosecution. The evidence did not require a finding that the arrest was made maliciously or without probable cause. The libellant at the close of the evidence asked for a ruling that the marriage be annulled on the ground that he was falsely imprisoned at the moment of marriage. The ruling was refused and the libel was ordered dismissed subject to exceptions by the libellant. *Held*, that the exceptions must be considered on the basis that the issuable facts were found against the libellant, and that therefore they must be overruled.

LIBEL for an annulment of marriage, filed on August 24, 1918.

A guardian *ad litem* of the libellee, a minor, was appointed.

In the Superior Court the libel was heard by *Hammond*, J. The material evidence is described in the opinion. At the close of the evidence and arguments the judge was requested by the libellant upon the evidence to rule that the marriage be annulled on the ground that he was falsely imprisoned at the moment of marriage. The judge refused so to rule and stated: "All the time he (Day) was in the custody of the officer he was legally in his custody and the marriage cannot be held to have been a marriage forced upon him by reason of an illegal arrest. He was entitled to a trial or hearing as a matter of right and, if he had asked it, it would have been granted him. Evidently there was a continuance to enable him to take, if he so desired, the remedy which the statute affords of marrying the other party. At first there was a plea of 'not guilty' and later a retraction and the plea of 'nolo' and a dismissal of the complaint when it was found that the parties were married. The libel is dismissed." The libellant alleged exceptions.

M. T. Flaherty, for the libellant.

J. M. Thayer, for the libellee, submitted a brief.

JENNEY, J. Earl W. Day contends that he is entitled to have his marriage with Margaret E. McClellan annulled, because it was procured by "duress and false imprisonment" while he was under arrest charged with getting said McClellan with child. See St. 1913, c. 563.

The libellant was arrested on said charge on May 2, 1918, and was taken before the Second District Court of Southern Worcester. The conflicting evidence warranted findings, (1) that the libellant, who was represented by counsel, voluntarily changed his plea of not guilty to that of *nolo contendere*, which plea was accepted by the presiding judge, and (2) that without coercion or fraud he

married the libellee. He remained in the custody of the arresting officer until the ceremony had been performed and was then released, his case having been placed on file upon the payment by him of certain expenses of prosecution. The evidence did not require a finding that the arrest was made maliciously or without probable cause.

At the close of the evidence, the libellant requested the trial judge to rule that he was entitled to have the marriage annulled, because he was falsely imprisoned at the time of his marriage. This ruling could not have been given properly. On the evidence the judge could have found that the libellant, who had been lawfully arrested, consented to a continuance of the proceedings until he had an opportunity to marry the libellee, and that the officer kept him in custody while the case was continued for the purpose of enabling the marriage to take place; that he chose to marry the libellee instead of contesting the charge; and that the restraint was not for the purpose of coercing him to marry the libellee. If such were the facts, he was not entitled to have the marriage annulled for the cause set forth in his request. *Wimbrough* v. *Wimbrough*, 125 Md. 619. *Seyer* v. *Seyer*, 10 Stew. 210. *Jackson* v. *Winne*, 7 Wend. 47. *Scott* v. *Shufeldt*, 5 Paige, 43. *Williams* v. *State*, 44 Ala. 24.

An order having been entered for the dismissal of the libel, the case must be considered on the basis that the issuable facts were found against the libellant, and the general exception to that disposal of it also must be overruled.

Exceptions overruled.

F. F. WOODWARD COMPANY *vs.* CITY OF FITCHBURG.

Worcester. September 27, 28, 1920. — October 15, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Damages, For property taken or damaged under statutory authority. *Sewer*. *Practice, Civil*, Report.

A report, by a judge before whom was heard a petition for the assessment of damages, alleged to have been suffered by the proprietor of a general grain, hay and feed business at wholesale and retail and incident to the construction by a city

of a sewer, of a refusal by him at the close of the evidence to rule that as a matter of law the petitioner was not entitled to damages, showed that the case had been fully tried and stated that no question was "raised as to the sufficiency of or as to the date of filing or bringing petition," and that judgment was to be entered for the petitioner in the amount of a verdict found by the jury, with interest, if "petitioner was entitled to recover damages." *Held*, that upon the record the petition must be considered as adequate for the giving of appropriate legal relief on the evidence, both because of the terms of the report and because the case had been fully tried.

In St. 1912, c. 440, empowering the city of Fitchburg to do the work, previously authorized by St. 1901, c. 354, of constructing, maintaining and operating main drains and common sewers, giving in express words authority not in terms conferred by the earlier statute, providing that the city should pay not only all damages sustained by reason of the taking of any interest in land, but also damages resulting from "any other thing done by [it] . . . under the authority of this act," and in terms repealing so much of the earlier statute as was inconsistent with it, the provision as to damages was intended to enlarge the provision contained in the earlier statute, and entitled a merchant to damages resulting from access to his premises being cut off by work in the construction of a trunk sewer in a public way adjacent thereto, although there was no taking of any of his property.

Upon a report, after the trial of a petition by a merchant for the assessment of damages under Sts. 1901, c. 354; 1912, c. 440, resulting from access to his place of business in Fitchburg being temporarily cut off by operations in an adjacent public way incident to the laying of a sewer, of the correctness of a refusal by the judge to rule that as a matter of law the petitioner was not entitled to damages, the report stating that, if the judge's action was correct, judgment should be entered in the amount of a verdict found by the jury with interest, it is not open to the respondent to contend that the petitioner was not entitled to recover at all because the damages were assessed on the basis of loss of business, it appearing that the temporary loss of access to the petitioner's place of business entitled him to some damages, which justified the refusal of the judge to give the ruling asked for, and the method of and the proper rules for assessing the damages not appearing to have been raised at the trial by the respondent.

PETITION, filed on June 19, 1916, for a jury to assess damages alleged to have resulted to the petitioner from access to his place of business being cut off temporarily during the laying of a trunk sewer on River Street in Fitchburg.

At the trial of the petition in the Superior Court, before *Cox*, J., the parties agreed to the following facts:

"Pursuant to legislative authority and direction, as set forth in St. 1901, c. 354, St. 1910, c. 461, and St. 1912, c. 440, the city during the past five years, (both before and after the grievances set forth in the petition,) was engaged in the construction of a new sewage system; that all of such construction was under the direction and subject to the control of a board of sewage dis-

posal commissioners, created by the statutes above noted; that, as one part of such system a sewer was laid along River Street in said Fitchburg in the spring and early summer of the year 1914; that this particular sewer construction work extended along the entire street frontage of petitioner's real estate, elevator and warehouses; that the petitioner's said buildings and real estate are bounded on one side by the Nashua River and on the other side by said River Street; and the petitioner's sole means of access to and from its real estate and buildings is through River Street; that the petitioner's spur track crosses River Street at a point in front of its buildings; that said River Street is a public way in the city of Fitchburg; that said spur track has been in use for many years and was legally authorized and established about the year 1875; that the petitioner is engaged in business substantially as set forth in its petition [a general grain, hay and feed business at wholesale and retail]; that because of the construction of said sewer in said River Street, alongside petitioner's elevator and warehouses, which construction was entirely within the limits of the street location (the said construction work being but temporary), access to and from the buildings of the petitioner was interrupted from June 6, 1914, to July 1, 1914; that, specifically, the spur track of the petitioner was completely blocked from June 6, 1914, to June 15, 1914, inclusive; that all interruptions and blocking was necessary in order that the construction work in placing the sewer in the street might be carried out and completed; that no part of the petitioner's land was used in this construction work."

The parties were unable to agree on the issues, how long the petitioner's warehouses were blocked from retail trade, the nature of the blocking of the access to the petitioner's buildings, and the amount of the petitioner's damages; and there was conflicting evidence on those issues, material portions of which are described in the opinion.

At the close of the evidence, the respondent asked the judge to rule that as a matter of law the petitioner was not entitled to damages. The judge refused so to rule. The jury found for the petitioner in the sum of $1,746.25, and the judge reported the case to this court for determination of the correctness of his refusal to rule as requested by the respondent, no question being "raised as to the sufficiency of or as to the date of filing or bringing peti-

tion," judgment to be entered for the petitioner in the amount of the verdict with interest from its date if "petitioner was entitled to recover damages."

E. W. Baker, for the petitioner.

C. T. Flynn, for the respondent.

JENNEY, J. The petitioner, a wholesale and retail dealer in grain, hay and "kindred merchandise," claims damages because all access to its warehouses for the requirements of its wholesale and retail trade was cut off for a substantial time, owing to the construction by the respondent of a trunk sewer, entirely on the public way which formed the only means of entrance to its land.

The case, after a verdict for the petitioner, comes before this court upon a report by a judge of the Superior Court wherein it is recited that no question was made as to "the sufficiency of or as to the date of filing" the petition for the assessment of damages, and that there was "evidence that, due to this blocking and construction, the petitioner suffered damages in excess of the amount awarded by the jury."

No question is directly presented relating to the form of the petition, to the admission of evidence, to the instructions given to the jury relating to the measure of damages or to any other matter involved in the case, the only exception being to the refusal of the judge "to rule that as a matter of law the petitioner is not entitled to recover damages," which request was properly made by a motion for direction of a verdict.

Even if it be assumed that the petition alleges damages solely because of a loss of business as such, the form of the petition is not open to the respondent. Where no objection is made because of the "sufficiency" of a petition, it must be considered as adequate for the giving of appropriate legal relief on the evidence. Moreover the case was fully tried, and the same result would follow apart from the terms of the report. The ruling now the subject of contention was not based upon the petition and evidence, and the language of the report shows that no matter of form was in controversy. If the respondent desired to raise the question that the petition did not set forth facts entitling the petitioner to recover at all, it should either have demurred or raised the defence by an explicit request for a specific ruling to that effect and, failing so to do, it must be deemed to have waived that objection.

Harris v. *North American Ins. Co.* 190 Mass. 361. *Ridenour* v. *H. C. Dexter Chair Co.* 209 Mass. 70. *Lafrance* v. *Desautels*, 225 Mass. 324.

By St. 1901, c. 354, the city of Fitchburg was authorized to construct, maintain and operate main drains and common sewers over a part or the whole of its territory, and also a system of sewage disposal. The statute provided that the city might take by purchase, or otherwise, any interest in real estate necessary to carry the conferred powers into effect, and that it might pay such damages as the owner or owners of any interest so taken should sustain by reason of such taking. It provided no remedy for damages except where there had been a taking under its terms.

St. 1912, c. 440, in substance, empowered the city to do the work previously authorized by St. 1901, c. 354, but gave in express words authority not in terms conferred by that statute, and provided that it should pay not only all damages sustained by reason of the taking of any interest in land, but from "any other thing done by [it] . . . under the authority of this act." It also in terms repealed so much of the earlier statute as was inconsistent with it.

It is urged by the respondent that the construction of the sewer in front of the petitioner's lands was under the authority of St. 1901, c. 354, and not under that conferred by St. 1912, c. 440, and that the broad provision as to damages quoted above does not apply, because the sewer was not constructed under the latter statute. The two statutes must be construed together; so construed, it plainly appears that this provision is intended to cover all work of the kind authorized or purporting to be authorized under the latter statute; and further, that the provision as to damages is intended to enlarge that contained in the earlier statute. See *Frost* v. *Wenie*, 157 U. S. 46, 58; *Commonwealth* v. *Flannelly*, 15 Gray, 195.

The respondent strongly contends that the petitioner is not entitled to recover at all, because it appears that damages were assessed on the basis of loss of business. It is unnecessary to consider the effect, under statutes like that now under consideration, of the principles laid down in *Edmands* v. *Boston*, 108 Mass. 535, *Chelsea Dye House & Laundry Co.* v. *Commonwealth*, 164 Mass. 350, *Williams* v. *Commonwealth*, 168 Mass. 364, *New York, New Haven,*

& Hartford Railroad v. *Blacker*, 178 Mass. 386, and *Boston Belting Co.* v. *Boston*, 183 Mass. 254, as no such issue was raised by any exception to the admission of evidence or request for ruling. The only question is whether there was evidence warranting the submission of the case to the jury. The statute provided for damages, not only by reason of the taking of any interest in land, but from "any other thing" done by the city under its authority. The petitioner's land was entirely cut off from all access to the public streets and this must be assumed to have been a necessary consequence of the building of the sewer. This was a special and peculiar damage. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. *Munn* v. *Boston*, 183 Mass. 421. Under the broad provision of the statute the petitioner, although none of its land was taken, and although the sewer was constructed in a public street, was at least entitled to the damages sustained by it in the loss of the use of its property, although the injury continued but a short time, the injury being of a kind for which the petitioner would have been entitled to damages had it been permanent. *Trowbridge* v. *Brookline*, 144 Mass. 139. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180. *Bickford* v. *Hyde Park*, 173 Mass. 552. *Putnam* v. *Boston & Providence Railroad, supra*. *Munn* v. *Boston, supra*.

The situation and the use made of the property were admitted in evidence without exception, and could be considered by the jury in determining the damages which the petitioner received. *Pegler* v. *Hyde Park*, 176 Mass. 101. *Wellington* v. *Cambridge*, 220 Mass. 312.

No error appearing, the respondent's exception must be overruled and judgment entered for the petitioner for $1,746.25 with interest from the date of the verdict, in accordance with the terms of the report.

So ordered.

THOMAS J. HOWARD *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Hampden. September 23, 1920. — October 16, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Employer's liability: federal employers' liability act, Violation of rule. *Evidence*, Violation of rule as evidence of negligence, Of rule, Of custom. *Custom*.

At the trial of an action for personal injuries, brought under the federal employers' liability act against a railroad corporation by a flagman in its employ in interstate commerce, there was evidence tending to show that, after the train upon which he was at work stopped in order that cars might be switched to a side track, the plaintiff in accordance with his duties started to walk back from the rear of the train between the rails to insure full protection to his train from a train following, that after he had gone a distance of five car lengths, his train without warning backed down upon him, that it was the duty of the engineer, before proceeding to back the train, to give a whistle signal. There was evidence that the signal was given. The plaintiff testified that he did not hear it, although he admitted that he paid no attention to the train after leaving it. *Held*, that

(1) The jury could have found that, had the whistle sounded, the plaintiff would have heard it;

(2) The jury could have found that the signal was not given, and that the failure to give it contributed to the plaintiff's injury;

(3) The question of the defendant's negligence was for the jury.

At the trial above described, there was evidence tending to show that, owing to the length of time that elapsed between the stopping of the train and its being backed, the engineer might well have inferred that the plaintiff had proceeded far enough back in the performance of his duties to make the giving of the signal unnecessary; but it was held that the questions, whether the failure to give the signal in accordance with the defendant's rule caused the plaintiff's injury, and whether the plaintiff assumed the risk of his injury in all the circumstances, were for the jury.

At the trial of the action above described, it was error to permit the plaintiff to testify that one of the defendant's examiners had told him that a train was not to move backward until a signal was given by the flagman who was protecting it in the rear, and that when he was injured the engineer had backed the train without receiving such a signal, it appearing that there was no such written or printed rule of the defendant and it not appearing that the examiner had authority from the defendant, express or implied, to make such a rule, to give such instructions, or to decide that the printed rules of the defendant should be so construed.

In the circumstances above described it was error to refuse to instruct the jury at the request of the defendant that "the action of the conductor or engineer

in causing the train to back without getting a signal from the plaintiff as rear end flagman so to do was not negligence."

At the trial above described, the plaintiff testified that there was a practice that no train protected by a flagman should be backed until a signal came from the flagman. The record showed no evidence tending to prove that this method of transacting its business was known to the defendant or to its officers, nor any evidence from which it could be inferred that it was assented to by them. The judge refused a request of the defendant, that the jury be instructed that upon all the evidence they could not find that "there was a practice or custom that freight trains engaged in switching movements should not back without getting from the rear end flagman the signal so to do." *Held*, that

(1) The defendant was not bound to observe a practice as to the moving of its trains adopted by its employees without its knowledge or acquiescence;

(2) The instruction asked for should have been given.

TORT for personal injuries received, as described in the opinion, while the plaintiff was in the employ of the defendant in interstate commerce. The declaration contained ten counts, upon only the sixth of which, a count based on the federal employers' liability act, 35 U. S. Sts. at Large, 65, as amended by 36 U. S. Sts. at Large, 291,* the plaintiff relied at the trial. Writ dated June 18, 1917.

In the Superior Court the action was tried before *Callahan*, J. Material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked, among others, for the following rulings of law:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. There is not sufficient evidence in the case that the defendant or its employees were negligent to warrant the jury in finding a verdict for the plaintiff."

"6. The defendant's employees in charge of the train had a right to back it for the purpose of switching as described in the testimony without looking for or receiving from the plaintiff a signal to back.

"7. The plaintiff as rear end flagman was not required nor entitled to give the engineer a signal to back for the purposes of switching as described in the testimony.

"8. The action of the conductor and engineer in causing the

* This statute in the amended form is published in *Corbett* v. *Boston & Maine Railroad*, 219 Mass. 351, at pages 352–355.

train to back without getting a signal from the plaintiff as rear end flagman so to do was not negligence.

"9. Upon all the evidence the jury is not warranted in finding that there was a practice or custom that freight trains engaged in switching movements should not back without getting from the rear end flagman a signal so to do."

"12. If the jury finds that the defendant's rules required the plaintiff as rear end flagman in going back to protect his train to walk between the rails of the track upon which his train was standing the plaintiff assumed the risk of being run into by train running on the same track."

"14. The plaintiff had no right to rely for his own safety on the observance of written or unwritten rules by his fellow employees or upon the assumption that they would look out for him."

"16. The plaintiff had no right under the rules of the defendant governing his conduct to wait until his train stopped before beginning to gather his tools and appliances and preparing himself for his duty as rear end flagman.

"17. If the plaintiff did not begin to get his tools and appliances and to prepare himself for performance of his duty as rear end flagman until his train stopped or after it stopped he violated the rules of the defendant governing his conduct and such violation constituted contributory negligence."

"19. If the plaintiff in violation of the rules governing his conduct remained in or about the caboose for a period of time sufficiently long to have enabled him to reach the point beyond where he was struck then he was negligent and the jury must find that such negligence was the sole cause of his injury and the plaintiff cannot recover."

The rulings were refused. The jury found for the plaintiff in the sum of $15,190; and the defendant alleged exceptions.

M. G. Gonterman, (*E. T. Broadhurst* with him,) for the defendant.

J. L. Gray, for the plaintiff.

CARROLL, J. The plaintiff, a flagman on one of the defendant's freight trains, about two o'clock on the morning of April 27, 1917, while in the performance of his duty of protecting the train, was injured by reason of its backing down upon him. The train left Bridgeport, Connecticut, and was on its way to Northampton in

this Commonwealth. It stopped at Congamond station in order that cars might be switched on to a side track, and while the trainmen were engaged in this operation, the plaintiff, who was about five car lengths distant from the rear of the train, was injured. The action is under the federal employers' liability act and the jury found for the plaintiff.

The defendant's motion for a directed verdict was denied properly. The plaintiff testified that after the train stopped he started to walk between the tracks to the south and had gone the distance of five car lengths when without warning the train was backed and he was hit by the "caboose" and thrown to the ground. There was evidence that it was the duty of the engineer, before proceeding to back the train, to give three short blasts of the whistle. While there was abundant evidence that this signal was given, the plaintiff testified he did not hear it, and although he admitted he paid no attention to the train after leaving it, the jury could have found that had the whistle been sounded he would have heard it, and that the failure to give the signal contributed to his injury. *Brusseau* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 84.

The plaintiff knew the train was to stop at Congamond station, that some of the cars were to be set off on a side track and the train backed. He also knew the location of the switch to the crossover track, that a train was following, and that it was necessary for him to go to a curve, a considerable distance south of the place where he was injured. The defendant's printed rules required the plaintiff, "When a train stops or is delayed, under circumstances in which it may be overtaken by a following train," to "go back immediately with stop signals a sufficient distance to insure full protection." After the train stopped it was the plaintiff's duty to go back at once a sufficient distance to protect it. The conductor, according to his testimony, left the car in which he and the plaintiff were riding when the train stopped and walked to the engine, a distance of thirty car lengths, and after talking with the engineer for ten minutes, walked back to the point where he could see the switch light and then gave the backup signal. If the conductor's evidence were believed, the jury could have found that the engineer might well have inferred that the plaintiff, in the exercise of his duty, was so far away, he was in

no danger of being struck while the train was backing to switch the cars on the side track. But notwithstanding this evidence the jury could say that the failure to blow the whistle as required by the defendant's rule, was the cause of the plaintiff's injury. The negligence of those in charge or control of the train was not a risk assumed by the plaintiff's contract of employment, and upon all the evidence the question of his assumption of the risk was for the jury. *Mackenzie* v. *New York Central & Hudson River Railroad*, 211 Mass. 586, 588. See *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492; *Jacobs* v. *Southern Railway*, 241 U. S. 229. Under the federal employers' liability act the contributory negligence of the plaintiff did not bar a recovery. U. S. St. 1908, c. 149, § 3, 35 U. S. Sts. at Large, 65, as amended by U. S. St. 1910, c. 143, 36 U. S. Sts. at Large, 291. This question was dealt with properly by the court.

For the purpose of proving the defendant's negligence the plaintiff was permitted to testify, subject to exception, that he had been told by one of the defendant's examiners that a train was not to move backwards until the signal was given by the flagman who was protecting it; and that when he was injured, the engineer had backed the train without receiving such signal. The defendant also requested a ruling that it was not negligence on the part of the conductor or engineer to cause the train to move in the direction of the plaintiff without first receiving a signal from him. This request was refused. The defendant's rules were in evidence and it was admitted that there was no written or printed rule requiring a signal from a flagman before backing a train. There is nothing in the record to show that the examiner referred to had authority, expressed or implied, to make such a rule or give such instruction, or to decide that the printed rules of the defendant should be so construed. All that appears is that he examined applicants for the positions of trainman and conductor, and as examiner he had no power to bind the defendant by his statement that such a rule was in operation. The defendant could not be charged with negligence for the violation of an alleged regulation established without its knowledge or authority. This evidence was not admissible for the purpose of proving the defendant's negligence, and as the jury may have found for the plaintiff on this ground, there was error in admitting it and in

refusing the defendant's request, as well as in the instructions given on this point.

The plaintiff further contended that the defendant was negligent because, according to his testimony, there was a practice that no train protected by a flagman should be backed until the signal came from him. Witnesses for the defendant stated that there was no written or unwritten rule, or any practice, which made it necessary for those in charge of a train to receive a signal from a flagman before backing. The record does not show when this practice, as claimed by the plaintiff, was initiated, to what extent it was followed, or on what part of the defendant's system it was in use. All that appears is the general statement that such a practice existed. Assuming, but without deciding, that the plaintiff was qualified to testify to the custom claimed, there was no evidence whatever to show that this method of transacting its business was known to the defendant or its officers, nor from which it could be inferred that it was assented to by them, and a particular method of moving its trains, adopted by employees without its knowledge or acquiescence, did not bind it. *Powers* v. *Boston & Maine Railroad*, 153 Mass. 188. *Massell* v. *Boston Elevated Railway*, 191 Mass. 491. See in this connection *Sawtelle* v. *Drew*, 122 Mass. 228; *Brady* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 225, 228, 229; *Conahan* v. *Fisher*, 233 Mass. 234.

The defendant asked the court to instruct the jury that, upon all the evidence, they could not find "there was a practice or custom that freight trains engaged in switching movements should not back without getting from the rear end flagman the signal so to do." The denial of this request was error.

Exceptions sustained.

PUTNAM MACHINE COMPANY *vs.* JOHN MUSTAKANGAS.

Worcester. September 27, 1920. — October 16, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Consideration, Validity, What constitutes. *Apprentice*. *Damages*, Liquidated.

By a contract in writing between a father, his minor son and the son's employer, a corporation, the son became an apprentice to the employer for three years to learn the trade of a machinist, the employer agreed to furnish the son with suitable work and supervision and faithfully to instruct him at its shop, and the father, in consideration of the employment of his son, released all claims to the son's wages and stipulated that they should be paid directly to the son and agreed that, if the son should violate any terms of the contract, he, the father, was to pay to the employer the sum of $100 "as ascertained and liquidated damages for such breach of contract." In an action by the employer against the father for breach of the contract, it was *held*, that

(1) There was a consideration for the contract as between the employer and the father;

(2) Although the contract was not a statutory indenture of apprenticeship nor made in accordance with the provisions of R. L. c. 155, it was valid and enforceable at common law by the employer against the father;

(3) Not being a statutory agreement of apprenticeship, the employer was not compelled by R. L. c. 155, § 11, to seek redress in the Probate Court, but might proceed at common law;

(4) The provision as to liquidated damages was valid.

A contract in writing, purporting to be between a corporation and an individual, may be enforced by the corporation against the individual if he signed it and it was assented to and accepted by the corporation, even if the corporation's name never was signed to it.

CONTRACT, with a declaration, as amended, in two counts, the first count (upon which the action was submitted to the jury) being upon the agreement in writing between the plaintiff, the defendant and the defendant's son described in the opinion. Writ in the Police Court of Fitchburg dated October 16, 1917.

On appeal to the Superior Court, the action was tried before *N. P. Brown*, J. There was no evidence of damage to the plaintiff. Material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. The contract declared upon was not executed in accordance with the statutes, R. L. c. 155.

"3. The contract declared upon is invalid and voidable.

"4. The jurisdiction under R. L. c. 155, was conferred exclusively to the Probate Court and the Superior Court has no jurisdiction."

The rulings were refused.

The judge ruled, subject to an exception by the plaintiff, that the plaintiff could recover nominal damages only. There was a verdict for the plaintiff in the sum of $1; and both parties alleged exceptions.

The case was submitted on briefs.

G. K. Hudson & G. M. Barrows, for the plaintiff.

F. A. Anderson & J. A. Anderson, for the defendant.

CARROLL, J. The plaintiff, the defendant and the defendant's son were parties to a written contract by which the son became an apprentice to the plaintiff for the term of three years to learn the trade of a machinist. We assume the defendant's son was a minor. The plaintiff agreed to furnish the apprentice with suitable work and supervision and faithfully to instruct him at its shops in Fitchburg. The defendant, in consideration of the employment of his son, released all claims to his wages and stipulated that they should be paid directly to him, and if the son should violate any of the terms of the contract, the defendant was to pay the plaintiff the sum of $100 "as ascertained and liquidated damages for such breach of contract." The jury returned a verdict for $1, and the case is before us on exceptions of both the plaintiff and the defendant.

There was a consideration for the contract. *Caden* v. *Farwell*, 98 Mass. 137. *Crombie* v. *McGrath*, 139 Mass. 550. Although the agreement sued on was not a statutory indenture of apprenticeship and was not made in accordance with the statutes of the Commonwealth governing the relation of masters and apprentices, R. L. c. 155, under it the plaintiff, as against the defendant, had the right to the services of the son; the contract was valid at common law, and an action could be maintained for its breach. *Day* v. *Everett*, 7 Mass. 145. *Phelps* v. *Townsend*, 8 Pick. 392. *Lobdell* v. *Allen*, 9 Gray, 377. *Caden* v. *Farwell, supra. Crombie* v. *McGrath, supra. Dickinson* v. *Talmage*, 138 Mass. 249.

The defendant also contended that the plaintiff could not recover because it failed to prove the proper execution of the contract. He admitted signing the agreement, and upon the "copy" delivered to him "was written by a typewriter 'Putnam Machine Company' but it was not signed by anyone." It was not questioned that the contract was assented to and accepted by the plaintiff; it therefore became bound by its terms, even if the instrument was not signed by it. *Phelps* v. *Townsend, supra. Newell* v. *Hill*, 2 Met. 180, 181. *Maine* v. *Cumston*, 98 Mass. 317, 320. *Bartlett* v. *Boston*, 182 Mass. 460.

Section 11 of R. L. c. 155, giving the Probate Court jurisdiction of complaints, of misconduct, or neglect of the master, or the wilful neglect or the gross misbehavior of the apprentice, has reference to the statutory agreement of apprenticeship, and does not bar the plaintiff from enforcing its rights under the common law agreement.

The exceptions of the defendant are overruled.

There was no evidence that the plaintiff suffered damage by the breach of the contract and the judge instructed the jury that, if they should find for the plaintiff, they were to return a verdict for nominal damages only, to which instruction the plaintiff excepted. From the nature of the undertaking and the subject matter of the contract, it might be difficult to determine the exact amount of damages. The parties might well agree upon them when the contract was made. It does not appear that they are excessive. It is expressly stated that the defendant was to pay $100 as ascertained and liquidated damages if the agreement was not fulfilled by his son. There is no suggestion of a penalty: the language indicates the intention of the parties to be that the sum agreed upon should be treated as liquidated damages, and not as a penalty. *Cushing* v. *Drew*, 97 Mass. 445. *Leary* v. *Laflin*, 101 Mass. 334. *Guerin* v. *Stacy*, 175 Mass. 595. *Garst* v. *Harris*, 177 Mass. 72. *Morrison* v. *Richardson*, 194 Mass. 370. *Kaplan* v. *Gray*, 215 Mass. 269. The instructions given on this point were erroneous. The plaintiff's exceptions must be sustained and judgment entered for the plaintiff in the sum of $100 with interest from the date of the writ. St. 1913, c. 716.

The defendant's exceptions are overruled.
The plaintiff's exceptions are sustained.

NATHANIEL L. HOWE *vs.* SARAH F. JOHNSON.

Worcester. September 28, 1920. — October 16, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Deceit. Railroad, Location, Grade crossing proceedings. *Practice, Civil*, Finding by judge, Exceptions. *Estoppel. Evidence*, Competency, Opinion: expert. *Agency*, Scope of authority.

A location of a railroad made in 1867 included the northerly portion of a certain lot of land. By a decision and decree of a commission for the abolition of a grade crossing, which was confirmed by the Superior Court, the base line of the location of the railroad was moved northerly a distance greater than that between the southerly line of the original location and the northerly line of the lot. The decision also contained, in a description of a portion of the lot which was taken for slopes, references to the southerly line of the original location of the railroad as coinciding with the northerly line of the lot. There were no express words in the decision, plan or decree of the commission discontinuing the original location of the railroad and no statement of the width of any new location. After the confirmation of the decree, the owner of the lot, representing it to be free from any incumbrance, conveyed it to one, who afterwards, contending that the land still was subject to the easement of the original location, brought against the grantor an action of deceit for damages resulting from the alleged false representation. *Held*, that it could not be implied or inferred from the provisions of the decision, plan and decree of the commission that the original location of the railroad was discontinued.

The action above described was heard by a judge without a jury, who found that the railroad had not abandoned the original location on the land in question. Upon an exception by the defendant, the record did not set forth all the evidence. *Held*, that no error of law appeared in the finding.

The mere production, by the railroad corporation at the hearing before the commission above described, of a plan which did not show the easement of the original location, could not be ruled as matter of law, at the trial of the action of tort above described, to create an estoppel of the railroad corporation from claiming the existence of such easement, where it did not appear that the owner of the land at the time of the hearings before the commission, the defendant in the action of tort, was induced by such conduct of the railroad corporation to do what otherwise he would not have done or to refrain from doing what he otherwise would have done, or that that corporation knew or had reasonable cause to believe that such owner would so act or refrain from acting to his harm.

An exception to the exclusion of a question asked of an expert witness at a trial will not be sustained where it appears that the information sought by the question was given in answer to a later question asked by the judge.

It is not reversible error to exclude at a trial a question of an expert as to his interpretation of a boundary shown on a plan in evidence.

Where, at the trial of an action for deceit, it appears that false representations, which were relied on by the plaintiff as the foundation of the action, were not made by the defendant but were made by his agent acting within the scope of his authority, it is not error to refuse a request for a ruling, "The plaintiff cannot recover, unless material statements made by the defendant were untrue, and known by the defendant to be untrue, unless such statements were made as of her own knowledge;" as the defendant would be bound by the agent's fraud if the agent made the representations knowing them to be false, or if he made them as of his own knowledge, although the defendant did not specifically authorize them and had no knowledge that they were made.

TORT for damages resulting from alleged misrepresentations by the defendant, to the effect that land on High Street and Water Street in Clinton, conveyed by her to the plaintiff in 1913, was free from incumbrances, whereas, the plaintiff alleged, it was subject to an easement, created by the location of the Agricultural Branch Railroad in 1867 and still existing for the benefit of that corporation's successor, the Old Colony Railroad, whose lessee was the New York, New Haven, and Hartford Railroad Company. Writ dated March 25, 1915.

In the Superior Court, the action was heard by *Aiken*, C. J., without a jury, upon questions relating to liability. It appeared that the location of the Agricultural Branch Railroad in 1867 included a quadrilateral tract of land in the northeasterly corner of the lot afterwards conveyed by the defendant to the plaintiff. In proceedings begun by the selectmen of the town of Clinton on November 22, 1904, for the abolition of a certain grade crossing, a decree of the commission, filed in May, 1912, and confirmed by the Superior Court, moved the base line of the location of the Old Colony Railroad (the successor of the Agricultural Branch Railroad), northerly. There was no specific discontinuance of the old location.

The defendant's main contention was that the "location of a railroad, legally speaking, is five rods in width, and, unless the same is limited in some lawful manner, that is just as well defined as though it were laid out by metes and bounds on the side lines," referring to St. 1906, c. 463, Part II, § 73, which reads: "A railroad corporation may lay out its railroad not more than five rods wide; and for the purpose of cuttings or embankments or of procuring stone and gravel and for depot and station purposes may purchase or otherwise take, in the manner hereinafter provided,

as much land as may be necessary for the proper construction and security of its railroad." If the mere changing of the base line of the location of the Old Colony Railroad made a new location restricted to five rods in width and discontinued the old location *pro tanto*, the lot conveyed by the defendant to the plaintiff was freed from the easement and the defendant was not liable.

The defendant also contended that, by reason of the language of a description, in the decision and decree of the commissioners, of a portion of the lot in question taken for slopes, which seemed to place the southerly boundary of the original location of the Agricultural Branch Railroad at the northerly bound of the land conveyed by the defendant to the plaintiff, it must be inferred that that land was entirely outside of the location of the railroad and free from the easement.

The plaintiff replied that there was no specific discontinuance of the old location and nothing from which such discontinuance could be inferred or implied.

One Frederick W. Bateman, who, it was agreed, was an expert engineer and qualified to express an opinion in regard to plans and plan readings, if such opinions were competent, was asked, relative to a plan which had been produced by the New York, New Haven, and Hartford Railroad Company at the hearings before the commission for the abolition of the grade crossing, "Now, Mr. Bateman, reading that plan, does the location of the railroad encroach upon the Johnson lot?" The question was excluded and the defendant excepted. Later, in answer to a question by the court, the witness made the statement described in the opinion.

The same witness was asked, relative to the side lines of the Old Colony Railroad, "whether or not that plan of itself shows the boundary of the Old Colony Railroad property delineated on the plan itself;" and answered that "there was on the plan no specific statement that any line represented the boundary of any especial, of any particular ownership," but that the whole effect and meaning of the plan was that it did indicate the boundaries of different parcels of property and of different owners and that he reached that conclusion from the general indication and appearance of the plan that certain lines were intended and did show

lines of ownership and parcels of land. This answer was admitted subject to an exception by the plaintiff.

The witness then was asked "to point out where those boundary lines are upon the map just north of the Johnson lot;" and, the court interposing, "Mr. Witness, you point out on that plan what lines indicate, in your opinion, the location of the Old Colony Railroad," he replied, "If your Honor please, I am uncertain as to the exact meaning of the word 'location.' If it means the location as filed with the clerk of courts, it is one thing. If it means the boundary of the railroad land as shown on this plan, it is another thing." He then was asked, "That is what I inquired about. What is shown on this plan?" His reply described the northern boundary of the lot conveyed by the defendant to the plaintiff. The bill of exceptions stated: "Thereupon on further objections by the plaintiff the answer was excluded and the defendant duly excepted."

Other material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. The Old Colony Railroad having succeeded to the rights of the Agricultural Branch Railroad, and the railroad location, as established by the decree of the grade crossing commission in the town of Clinton not including any part of the Johnson land, there are now no rights in the Old Colony Railroad, by the way of easement or otherwise, in the Johnson land, and the plaintiff has a good title to the land" conveyed by the defendant to the plaintiff.

"3. The plaintiff has a good title to the land which he claims was shown to him and bargained to him by the defendant.

"4. The plaintiff cannot recover, unless material statements made by the defendant were untrue, and known by the defendant to be untrue, unless such statements were made as of her own knowledge."

"6. The Old Colony Railroad, the successor of the Agricultural Branch Railroad in title, having produced at the hearings on the petition for the abolition of grade crossings at Clinton a plan which showed the Johnson land to extend one hundred and four feet on High Street, and showed their own land or location as not extending farther south than that point, and the decree

thereon including such plan, is estopped from making any effectual claim beyond that point."

The foregoing rulings were refused. Material findings and rulings upon evidence by the Chief Justice of the Superior Court are described in the opinion. He found for the plaintiff on questions relating to liability and referred the case to an assessor on the question of damages; and the plaintiff's damages were assessed in the sum of $532.30 and interest. The defendant alleged exceptions.

The entire evidence was not reported, the defendant relying solely upon the decision, plans and decree of the Clinton grade crossing commission as the basis for her requests numbered one, two and three. That decree was not printed with the record. The bill of exceptions contained the following statement: "This decision, the plans filed therewith, and the decree therein may be referred to, either party calling the court's attention to such part of either as he deems material to the issues raised herein."

R. B. Dodge, for the defendant.

J. A. Stiles, for the plaintiff.

CARROLL, J. The defendant by warranty deed conveyed a tract of land in Clinton to the plaintiff. The description included a quadrilateral area at the northwest corner which was subject to an easement created by the location of the Agricultural Branch Railroad filed in 1867. The action is in tort, the plaintiff contending that he believed he was acquiring a good title to the entire tract, free from any incumbrance, and was induced to make the purchase by reason of the false representations of fact made by the authority of the defendant. In the Superior Court it was found that the plaintiff could recover for the failure to give him an unincumbered title, and damages were awarded. The name of the Agricultural Branch Railroad was changed to Boston, Clinton and Fitchburg Railroad Company, St. 1867, c. 153, § 1, and the latter consolidated with the Old Colony Railroad Company, St. 1882, c. 80, and subsequently leased to the New York, New Haven, and Hartford Railroad Company.

In December, 1912, a decree was entered confirming the decision of commissioners appointed to abolish certain grade crossings in the town of Clinton, and in January, 1913, the lot was conveyed and the deed delivered to the plaintiff. The defendant asked the court to rule that the plaintiff could not recover; that

the plaintiff had a good title to the land conveyed; that the Old Colony Railroad had no rights by way of easement or otherwise in the land; and that the location of the railroad as established by decree of the grade crossing commission did not include any part of the tract in question. These requests were refused. The record recites that the defendant based these requests solely on the decision, plans and decree of the grade crossing commission. It is further stated in the record that there are no express words in the decision, plan or decree discontinuing the location of the Agricultural Branch Railroad and no statement of the width of any new location. The entire evidence is not reported.

The location of the Agricultural Branch Railroad established in 1867 was not expressly changed by the decree of the commission, and it cannot be said that such a change is to be implied. The base line of the Old Colony Railroad was changed, and this is fully described, but the report does not attempt to decide that the old location should be changed or discontinued, and it does not describe a substitute location. St. 1907, c. 233, relating to the abolition of streets and railroad crossings in Clinton, was passed after the commissioners were appointed, and thereafter they acted under this statute as well as under the provisions of the general law. By R. L. c. 111, § 152, if the commission decided that "the location of the railroad or of the public or private way shall be changed, the decree of the court confirming such decision shall constitute a taking of the specified land or other property." This statute clearly contemplates that the proposed changes should be described, and that the location if changed or discontinued should be specified, and not left to mere implication. It was said in *Mayor & Aldermen of Newton, petitioner*, 172 Mass. 5, 7, speaking of St. 1890, c. 428, providing for the abolition of certain grade crossings in Newton: "Except so far as is necessary to accomplish the proposed abolition, the existing conditions are, for aught that appears, to continue substantially as before. If the proposed abolition cannot be accomplished except by discontinuing an existing way and building a new way, or by relocating the railroad, that may be done. But this does not alter the fact that the statute contemplates a continuance of existing conditions, subject to such changes in them as may be required to accomplish the abolition of crossings at grade." The principle

here stated is applicable to the case at bar. The decision does not show that it was necessary to change the existing location in order to accomplish the change in the grade crossings, and the existing conditions were to remain as they were, subject only to such changes as were set out in the decision, and as no specific change in the location was ordered as required by statute, the location continued as before. "It is at least doubtful whether under this requirement a discontinuance [of a public way] could be found to have been made by implication. Certainly, when the statute requires specification not only of any such discontinuance, but also of the grade which is to be established, it would be yet more difficult to infer one of these requisites from a declaration of the other." *Bliss* v. *Attleborough*, 200 Mass. 227, 230, 231.

Even if the old location could be discontinued by implication, and a new one substituted, we find nothing in the decision which warrants this inference. No new location was established; the only change in this respect was the making of a new base line, and it cannot be inferred from this that the old location was extinguished. In describing the land taken for slopes, the tract in question is referred to and its boundaries given, and from these boundaries as well as from the plans filed with the report, the defendant contends that the lot is shown to be outside of the railroad location and free from the easement. We do not think it can be implied from this description of the land taken for slopes that the established location of the railroad was discontinued or the easement over the land extinguished.

The judge found that the title of the railroad company to the quadrilateral tract was not abandoned. Abandonment is usually a question of fact, *Willets* v. *Langhaar*, 212 Mass. 573, and there was no error of law in this finding.

The sixth request was refused properly. The mere production of the plan by the Old Colony Railroad at the hearing before the commission, showing that the land conveyed extended one hundred and four feet on High Street, did not work an estoppel against the railroad company. There was no evidence that the defendant was induced by the conduct of the railroad company to do what she otherwise would not have done or to abstain from doing what she would have done, nor that the company knew or had reasonable cause to know that the defendant would so act or refrain from

acting to her harm. *E. V. Harman & Co.* v. *William Filene's Sons Co.* 232 Mass. 52.

The defendant was not harmed by the exclusion of the question put to the witness Bateman. In reply to a question by the court he stated that "scaling down" forty-one and one half feet from the new base line, the lot in question was not involved. This in effect was an answer to the question excluded. Nor was there error in excluding the answer of the witness as to the boundary of the railroad land as shown by the plan. The plan was in evidence and it was not reversible error of law to exclude the interpretation placed on it by the witness. *Boston & Albany Railroad* v. *Reardon*, 226 Mass. 286, 292.

The defendant made this request: "The plaintiff cannot recover, unless material statements made by the defendant were untrue, and known by the defendant to be untrue, unless such statements were made as of her own knowledge." The plaintiff does not seek to recover for breach of the covenants in the deed. The action sounds in deceit and the recovery was on this ground; and if the false representations were made by the defendant, she was entitled to this request and it should have been given. *Tucker* v. *White*, 125 Mass. 344. *Kerr* v. *Shurtleff*, 218 Mass. 167, 171. *Bates* v. *Cashman*, 230 Mass. 167.

But the record shows that the misrepresentations upon which the plaintiff relied were made with the authority of the defendant and there is no statement that any of the false representations were made by the defendant. We interpret this finding to mean that the misrepresentation was made by an agent or agents of the defendant and not by the defendant herself. If the false statements were made by an agent of the defendant who was authorized to make the sale, she was bound by his fraud if he made the statements knowing them to be false, or if he made them as of his own knowledge, although the defendant did not specifically authorize them and had no knowledge that they were made. *Haskell* v. *Starbird*, 152 Mass. 117. For this reason it was not error to refuse this request.

We discover no error of law in the findings or rulings made, and we cannot say that as matter of law the land conveyed was not subject to the easement.

Exceptions overruled.

WALTER A. ROBBINS, administrator, *vs.* ATHOL GAS AND ELECTRIC COMPANY.

SAME *vs.* MINUTE TAPIOCA COMPANY.

Franklin. September 22, 1920. — October 19, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Causing death, Trespasser. *Wanton and Reckless Misconduct. Evidence*, Competency, Opinion: expert.

If a boy, who, without any knowledge on the part of or invitation from the proprietor, approached a factory by the main driveway leading to it, went around it to the rear, proceeded there by a grassed-over path toward its boiler room to procure empty spools such as a previous occupant of the factory had given to him, and, seeing some electric transformers standing twenty inches above the ground a few feet from the path with wires running therefrom to the factory, went to them and, seizing a wire, is killed by reason of the high voltage of the electricity, there can be no recovery under St. 1907, c. 375, either in an action against the proprietor of the factory or in an action against an electric company which owned, controlled and maintained the transformers and wires, unless it be shown that the boy's death was caused by wilful, wanton or reckless misconduct on the part of the defendant, the boy being a trespasser when he was killed.

At the trial together of the actions above described, there was evidence tending to show that the proprietor of the factory, less than three months previous to the accident, had authorized the electric company to place the transformers and wires on the factory grounds at some convenient place and had permitted them to remain there, where they still were owned and controlled by the electric company, that he had been informed of a break in the insulation of a wire and immediately had notified the electric company, and that the electric company had not remedied the break. There was no evidence warranting a finding that either defendant had any reason to anticipate that the boy would approach the dangerous transformer, much less put his hand upon the wires, and it appeared that he had not taken hold of the wire where the insulation was broken. *Held*, that, while in the light of the accident it seems that the apparatus might well have been enclosed or otherwise guarded, the evidence did not warrant a finding that either defendant had been guilty of wilful, wanton or reckless misconduct which had caused the boy's death.

St. 1907, c. 375, amending R. L. c. 171, § 2, so that the liability, thereby constituted, of a person or corporation for the causing of death by his or its agents or servants is based upon their negligence instead of upon their gross negligence, did not undertake to create a lower standard of duty where a penalty is sought under the statute because the injury results in death than that which exists at common law when the injured person survives.

Testimony, at the trial of the actions above described, of a companion of the boy who was killed, "I told him [immediately before the accident] not to touch it [the wires] and he said he was not afraid," was *held* to have been competent to

prove that the plaintiff's intestate was aware of the danger of his action and was not in the exercise of due care when killed.

At the trial of the actions above described, after all the facts with reference to the transformers, wires and voltage had been placed before the jury, an expert called by the plaintiff was asked, whether in his opinion "that whole thing is safe or unsafe," the plaintiff expecting an opinion as to the danger of leaving the apparatus unenclosed. The testimony was excluded. *Held*, that the exclusion was proper, the subject matter being one to be determined by the jury and not one upon which the opinion of an expert was competent.

TWO ACTIONS OF TORT, each with a declaration in two counts, alleging that the defendant therein had caused the death of the plaintiff's intestate, negligence in permitting the transformer and its wires, described in the opinion, to become defective and in a dangerous condition being charged in the first count in each declaration, and "wilful, wanton and reckless negligence" being alleged in the second count. Writs dated March 3, 1919.

In the Superior Court, the actions were tried together before *Sisk*, J. The material evidence is described in the opinion. At the close of the evidence, a motion of the defendant that a verdict be ordered in its favor was allowed in each action and a verdict was returned accordingly. The plaintiff alleged exceptions.

W. A. Davenport, (*C. Fairhurst* with him,) for the plaintiff.

J. B. Ely, for the defendant Athol Gas and Electric Company.

R. H. Oveson, for the defendant Minute Tapioca Company, submitted a brief.

DE COURCY, J. These two actions, tried together, were brought to recover damages for the death of the plaintiff's son, Lewis H. Robbins, who received an electric shock from a highly charged transformer wire owned by the electric company and located on land of the tapioca company. In each case the main question is whether there was evidence of a breach of legal duty on the part of the defendant entitling the plaintiff to go to the jury.

The property of the tapioca company was on the north side of East Main Street in Orange. A main driveway extended from the street along the easterly side of the factory buildings. On the westerly side of the buildings, on the land of the company, there was a path or passageway which was grassed over except where ruts were made by the company's trucks in carrying coal to its bins. Members of a gun club, and owners of land to the north, sometimes made use of this way, especially before the property was acquired by the tapioca company. In July, 1918, the electric

company, under a contract to supply power to the factory, placed three of its transformers on land of the tapioca company a few feet west of said way, and erected poles between them and the way. The transformers were about three feet high and rested upon a platform twenty inches above the ground. The primary wires entering them carried a voltage of about twenty-three hundred volts; the secondary wires, which ran to the nearest building, carried a voltage of one hundred and ten and two hundred and twenty volts. The insulation was the ordinary triple braid kind used for outside construction. There was evidence that the insulation was off at one place. Apparently this was not where the accident happened; but that is not controlling, in view of the testimony of the plaintiff's expert, that the intestate would receive the shock at any other part.

The story of the accident was told by the Bristol boy, who was with the intestate, Lewis H. Robbins, at the time. It appears that before the tapioca company took the factory in 1918, the boys had sometimes secured empty spools from the previous occupant, a shoe company. On the afternoon of September 21, 1918, they left Bristol's house east of the factory, purposing to get some spools at the boiler room; they went around the rear of the factory, and then along the path on the westerly side, to a point opposite the transformers. Bristol remained in the middle of the path. The Robbins boy, although warned by his companion not to touch the transformers, reached his hand up over his head, took hold of a wire, and was instantly killed.

On the evidence it is clear that the intestate had no invitation, express or implied, from either of the defendants to go to the place where he was injured. Even when on the driveway he was at most a licensee, and must be regarded as a trespasser when he left the way and approached the transformers. The only legal duty that the defendants owed to him, either as licensee or as trespasser, was to abstain from any wilful, wanton or reckless conduct that was likely to injure him. They were not obliged to keep the premises safe for his use, or to warn him of the dangerous character of the mechanism obviously maintained thereon. *Daniels* v. *New York & New England Railroad*, 154 Mass. 349. *Hector* v. *Boston Electric Light Co.* 161 Mass. 558. *Hillman* v. *Boston Elevated Railway*, 207 Mass. 478, 483. *Romana* v. *Boston*

Elevated Railway, 218 Mass. 76, 82, and cases cited. *Graham* v. *Pocasset Manuf. Co.* 220 Mass. 195. Something more than gross negligence on their part was required in order to make them liable. *Altman* v. *Aronson*, 231 Mass. 588, 592.

The evidence would not warrant a finding that either defendant was guilty of a wilful and intentional wrong, or of such reckless disregard of probable consequences as is equivalent thereto. *Dean* v. *Boston Elevated Railway*, 217 Mass. 495, 498. The only evidence against the tapioca company was that its officers, less than three months previous to the accident, authorized the electric company to place the transformers and wires on their land at some convenient place, and permitted the apparatus to remain there; that when they were informed about the exposed wire, they immediately notified the electric company, which owned, located and controlled it. It does not appear that they had any reason to anticipate that the intestate would approach this dangerous transformer, much less put his hand upon the wires. During their occupancy he had never come upon their premises for spools, and none were there. The same is true also of the electric company. The transformer was not defective; and the exposed wire to which its attention was called does not appear to have caused the injury. Both were on private land, and there is no evidence that this company knew or should have known that children ever trespassed in the vicinity. While in the light of the accident it seems that the apparatus might well have been enclosed or otherwise guarded, the failure to do so was not a breach of any legal duty owed the intestate by either of the defendants. In *Romana* v. *Boston Elevated Railway*, 218 Mass. 76; *S. C.* 226 Mass. 532, relied on by the plaintiff, there was evidence that for several years a trolley pole was allowed to remain dangerously electrified by reason of defective insulation, and that the defendant was chargeable with what its employee, Sullivan, knew, namely, that many persons as licensees were using the path near the pole, where the plaintiff was at the time of the accident, and would be likely to suffer grievous bodily injury. In *Boutlier* v. *Malden*, 226 Mass. 479, it could be found that the plaintiff was a traveller upon the highway; and that the broken wire and the high tension wire from which it was charged were located without legal authority and were maintained in a defective and dangerous condition.

The plaintiff's contention, based upon the language of the "death statute," that he need establish only ordinary negligence on the first count, cannot prevail. At common law there was no recovery of damages for loss of life. The history of the legislation giving a remedy for death is traced in *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, and *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, and need not be repeated. The statute (St. 1907, c. 375) provides: "If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages," etc. This statute struck out the requirement of "gross" negligence on the part of the wrongdoer's "agents or servants," which is contained in the earlier legislation. But it did not undertake thereby to create a lower standard of duty in death cases than that existing where only damages for conscious suffering are sought; in other words, to give damages as a penalty where the injury results in death, while denying compensation where the injured person survives. As was said in *Bergeron* v. *Forest*, 233 Mass. 392, 399, "Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation due to the person sustaining injury." As already stated, that legal duty, in the case of a trespasser, is to abstain from wilful, wanton or reckless conduct which is likely to injure him.

The exceptions relating to evidence call for brief notice. The testimony of what the Bristol boy said to the intestate immediately before the accident, "I told him not to touch it and he said he wa'n't afraid," was competent to prove that the intestate was aware of the danger and was not using due care. *Fitzpatrick* v. *Fitchburg Railroad*, 128 Mass. 13. No request was made to strike out the last part as not responsive. We find no error in excluding the question to the expert, whether, in his opinion, "that whole thing is safe or unsafe?" The question sought an opinion as to the danger of leaving the apparatus unenclosed. All the facts with reference to the transformers, wires and voltage of the electric current were before the jury. Whether the arrangement was safe for persons in its vicinity could be judged by the ordinary man in the light of common experience, and did not call for expert opinion. *Reed* v. *Edison Electric Illuminating Co.* 225 Mass. 163, 167.

Other exceptions to evidence are not argued, and we treat them as waived.

In view of the conclusion that there was no evidence to warrant a finding of breach of legal duty on the part of either defendant, it is unnecessary to consider the issue of the intestate's due care.

Exceptions overruled.

ERNEST GERHART *vs.* HOLYOKE STREET RAILWAY COMPANY.

Hampden. September 23, 1920. — October 19, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, & JENNEY, JJ.

Negligence, Street railway, In use of highway.

At the trial of an action against a street railway company for personal injuries received when the plaintiff was run into by an open electric car of the defendant in a street in a city at about nine o'clock in an evening in July, there was evidence tending to show that in the middle of the street where the collision occurred were double tracks of the defendant, with about twelve and one half feet of roadway between each curb and the nearest rail; that at that time the street between the rails was impassable for vehicles because of repairs being made; that, previous to the accident, the plaintiff, standing in a doorway on the street, saw the car, which later ran into him, approaching from his right on the farther track and about four hundred and fifty feet distant, and that his view of it thereafter was unobstructed, the street being well lighted and the car's strong headlight being turned on; that the plaintiff then crossed the sidewalk and the adjacent roadway and with a folded newspaper motioned to the motorman to stop at a nearby stopping place; that it was necessary for the plaintiff to cross both tracks to take the car; that the car, as it approached, running at the rate of seven or eight miles an hour, still further diminished its speed, and the plaintiff, seeing this, started across the tracks in front of it; that then the motorman started to "move again quick;" that, just before the plaintiff got across the farther track, he saw a motor car approaching from his left on its left hand side of the track and coming close to the street railway track on the side he was approaching; that the plaintiff turned and faced the motor car, with his back to the approaching street car, which then was either seven or eight, or thirty or thirty-five feet distant from him; that the motorman, although he saw the plaintiff before he reached the tracks, did not see his signal to stop; that the plaintiff was struck on his left leg by the running board of the street car and was thrown against the motor car. *Held*, that

(1) It could not be ruled as a matter of law that the plaintiff was negligent;

(2) The question of the motorman's negligence was for the jury.

TORT for personal injuries caused by the plaintiff being run into by an electric street car on Chicopee Street in Chicopee. Writ dated August 28, 1916.

In the Superior Court the action was tried before *Irwin*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. The jury found for the plaintiff in the sum of $557; and the defendant alleged exceptions.

D. H. Keedy, (*J. P. Kirby* with him,) for the defendant.

J. L. Gray, for the plaintiff.

JENNEY, J. The plaintiff seeks to recover compensation for damages sustained by him, about nine o'clock in the evening of July 31, 1915, when he was hit by the running board of an open electric car of the defendant on Chicopee Street in Chicopee. The double track of the defendant occupied a space fourteen feet seven inches in width in the centre of the roadway, which was about forty feet wide between the curbs. The distance between the easterly curb and the most easterly rail was twelve feet ten inches; and that between the most westerly rail and the westerly curb was twelve feet six inches. At or very near the point where the accident happened, there was a regular stopping place for cars. The street was well lighted and the "strong, brilliant" headlight of the car was on. The tracks were in process of reconstruction, "the street between both lines of track" being "pretty well ripped up" with a "lot of trap rock" between the rails, but not so high as the rails. The plaintiff was thoroughly familiar with the conditions then existing. The sole question is whether the defendant's motion that a verdict be ordered in its favor was denied rightly.

The jury upon the contradictory evidence would have been warranted in finding the facts as follows: The plaintiff, who had been standing in a doorway on the easterly side of the street, saw the car with which he collided when it was about four hundred and fifty feet northerly from him and as it came around an angle in the street, and thereafter his view of it was unobstructed. He left the doorway, crossed the sidewalk and entered upon the travelled road, holding in his hand a folded newspaper and motioning with it to the motorman to stop. It was necessary for the plaintiff to cross both tracks in order to take the car. The car, which had been going seven or eight miles an hour, slowed down and then started to "move again quick." The plaintiff saw the diminution in its speed. The motorman, although he saw the plain-

tiff before he was on either track, did not observe his signal to stop. The plaintiff was hit by the running board when he was just crossing the westerly track, but before he had fully got over it. Just before he had "got pretty nearly across," he saw an automobile approaching from the south on the westerly or left hand side of the street and "coming pretty close" to the westerly track. When he saw the automobile, he faced it, with his back to the car, which at that instant was either seven or eight feet away from him, or about thirty or thirty-five feet distant — the smaller figures being those given by the plaintiff, and the larger those of the motorman. The plaintiff's left leg was hit by the lower running board of the electric car and he was thrown against the passing automobile, receiving injury both from his impact with the car and from that with the automobile. The motorman saw the approaching automobile before the accident.

The case was properly submitted to the jury. The plaintiff was so situated that he was in danger of collision with the automobile, or of being caught in an insufficient space between the automobile and the electric car if he went forward, or of being struck by the electric car if he stood still. His action in putting himself in that situation at or near a place where he had reason to believe the car would stop to receive him and in failing to retreat, even if there were time so to do, cannot as matter of law be held negligent. He was not bound to assume that the automobile, which was approaching on the left side of the street, would come so near the tracks as to give insufficient space between it and the car. *Hunt* v. *Old Colony Street Railway*, 206 Mass. 11. *Magner* v. *Boston Elevated Railway*, 209 Mass. 60. *Meysht* v. *Boston Elevated Railway*, 210 Mass. 341. *Thompson* v. *Boston Elevated Railway*, 227 Mass. 407. *Neafsey* v. *Szemeta*, 235 Mass. 160.

The question of the negligence of the motorman was also properly submitted. The car was about to pass a moving automobile at a place used for the receipt of passengers, and where a person in fact desired to become a passenger. The motorman, who saw the plaintiff, did not see the signal to stop. It could have been found, either that he failed to have the car so under control that it could have been stopped before the accident, or that he could have stopped it, but did not do so. This was sufficient to warrant

the submission of the case to the jury. *Hunt* v. *Old Colony Street Railway, supra. Mullen* v. *Boston Elevated Railway,* 209 Mass. 79. *Niles* v. *Boston Elevated Railway,* 230 Mass. 316.

Exceptions overruled.

ANNA A. BATTELLE *vs.* CITY OF WORCESTER.
SAME *vs.* SAME.

Worcester. September 28, 1920. — October 22, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Deed, Construction. *Water Rights. Restraint on Alienation. Perpetuities, Rule against. Damages,* For property taken or damaged under statutory authority.

The owner of land bounded on the thread of a stream, across which there was a dam, built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, executed and delivered in 1849 an agreement in writing, in the form of an indenture, with the owner of the dam, in which the owner of the land for himself and his heirs and assigns did "let lease and license" the owner of the dam, "his heirs and assigns to maintain said dam at its present height and to flow said land as much as said dam at its present height will flow the same," the owner of the dam, "his heirs and assigns paying" to the owner of the land $4 rent "each and every year so as" the owner of the dam his heirs and assigns "shall keep up any part of said dam;" the owner of the dam for himself, his heirs, executors, administrators, and assigns, covenanted in substance that, upon receipt of $800 "at any time" from the owner of the land or his heirs, executors, administrators or assigns, he or his heirs, executors, administrators or assigns would "relinquish all his right and title and interest in the said dam and give the same" to the landowner or his "heirs, executors, administrator or assigns forever and give good sufficient deed to effect the same." The stipulated rent was paid for over sixty years, when, under statutory authority, the land and dam were taken by a city for the purposes of its water supply. Upon a petition for the assessment of damages resulting from such taking, it was *held,* that

(1) The contract was not in violation of the rule against restraints on alienation or the rule against perpetuities;

(2) The agreement was not a personal contract between the parties;

(3) The rights of the petitioner had not been lost by laches, but still were vested in him at the time of the taking;

(4) There was incident to the land of the petitioner which was taken a right or interest under the contract which ought to be considered in estimating the fair market value of the land taken;

(5) The covenant relating to the release of the right to maintain the dam upon a payment of $800 by the owner of the land related only to that part of the dam

built upon the petitioner's land and not to the part built upon land on the other side of the thread of the stream;

(6) Damages assessed in connection with the contract should be limited to the value of the petitioner's right, which related only to that part of the dam which rested upon the petitioner's land.

TWO PETITIONS, filed in the Superior Court on February 12, 1914, and August 2, 1915, for the assessment of damages for the taking by the respondent of certain land and water rights under Sts. 1900, c. 365; 1902, c. 351, for the purposes of its water supply.

The petitions were heard by *Lawton*, J., upon an agreed statement of facts. Material facts are described in the opinion. "Exhibit A," there referred to, embodied the permission given by the predecessor in title of the petitioner to the predecessor in title of the owner of the dam described in the opinion, and read as follows:

"Dover, July 18, 1838. To the Eagleville Mfg. Co., Gent: We hereby give you the privilege of bounding and butting a dam on our land in Holden adjoining land of Joseph Hubbard, we reserving the right of damage that may accrue in consequence thereof.

Signed John Battelle, Jr.
John Shumway."

"Exhibit B" read as follows:

"To whom it may concern: This may certify that we, the subscribers, Thomas J. Davis and Charles Chaffin, referees to determine and appraise damages of flowage and taking gravel in the west part of Holden on land of Messrs. Battelle and Shumway and Joseph Hubbard, by means of a certain dam erected by LeBaron Putnam and others, viz: We award to Battelle and Shumway three dollars to be paid annually forever as damages for flowing their land, and five dollars for gravel taken to build the dam; to Joseph Hubbard we award two dollars to be paid annually forever, and five dollars for gravel taken to build the dam; all of said sums we award to be paid by the mill owners below or by said LeBaron Putnam during the continuance of flowing said land.

Holden, May 8, 1848.

Thomas J. Davis,
Charles Chaffin."

"Exhibit C" was as follows:

"Know all men by these presents that we, Hannah Battelle and Abigail Shumway, both of Dover in the County of Norfolk, being owners and tenants in common of a certain tract of land and a water privilege in Holden in the County of Worcester, which land is in part overflowed by a dam erected upon said privilege with the consent of said Battelle and Shumway by LeBaron Putnam of said Holden do for ourselves and our heirs and assigns let lease and license said Putnam his heirs and assigns to maintain said dam at its present height and to flow said land as much as said dam at its present height will flow the same he the said Putnam his heirs and assigns paying said Battelle & Shumway their heirs and assigns four dollars per year rent therefor commencing on the tenth day of October in the year 1848 and paying the same sum yearly on the tenth day of October each and every year so long as the said Putnam his heirs and assigns shall keep up any part of said dam. And the said Putnam for himself and his heirs and executors, administrators, covenants with said Battelle and Shumway their heirs and assigns that he and his heirs executors, administrator shall and will pay to said Battelle and Shumway or their executors, administrators or assigns said sum of four dollars every year as aforesaid. And said Putnam for himself, his heirs, executors, administrators, assigns further covenants with said Battelle & Shumway that he will and his heirs and assigns shall at any time when said Battelle & Shumway or their heirs, executors, administrators and (sic) assigns shall pay to him or to his heirs, executors, administrator or assigns the sum of eight hundred dollars he or his heirs, executors, administrators or assigns shall and will relinquish all his right and title and interest in the said dam and give the same up to said Battelle and Shumway or their heirs, executors, administrator or assigns forever and give good sufficient deed to effect the same.

In witness whereof we the above named parties herein named set out [our] hand and seal this ninth day of May in the year of our Lord eighteen hundred forty-nine.

In presence of	LeB. Putnam, (seal)
Amos W. Shumway.	Hannah Battelle, (seal)
	Abigail Shumway, (seal)"

The judge of the Superior Court found and ruled that the documents, Exhibits A, B and C, and agreed facts in connection therewith might "be considered on the question of damages over and above the hereinafter stipulated sum of $1,750," and, being of the opinion that such interlocutory finding and ruling ought to be determined by this court before any further proceedings in the trial court, and with the consent of the parties, reported the cases for that purpose upon the agreed statement of facts and a stipulation, in substance, that, if the exhibits above set out should be excluded from consideration in assessing the petitioner's damages, then those damages in the two petitions should be assessed at $1,750; and, if the exhibits should be taken into consideration, then the damages should be assessed by an assessor to be appointed by the Superior Court.

F. F. Dresser, for the petitioner.

J. W. Mawbey, (*F. L. Riley* with him,) for the respondent.

CROSBY, J. These are two petitions for the assessment of damages for the taking of certain land and water rights under St. 1900, c. 365, and St. 1902, c. 351. By these statutes it is provided that the city shall be subject to all the duties and liabilities set forth in St. 1871, c. 361 (St. 1900, c. 365, § 2, St. 1902, c. 351, § 3); and by St. 1871, c. 361, § 3, that the city "shall be liable to pay all damages that shall be sustained by any persons in their property, by the taking of any land, water or water-rights." The case is before us on a report of a judge of the Superior Court, an agreed statement of facts, and a stipulation.

The land taken from the petitioner is bounded on the thread of a stream known as Asnebumsket Brook. The land on the opposite side of the brook at the time of the taking was owned by one Kronoff. For about seventy-five years previous thereto, there had existed across the stream and abutting upon the lands above referred to, a dam which flowed back, upon the petitioner's land and the Kronoff land, the waters of the brook and created a reservoir known as "Pine Hill Reservoir." The dam was erected between 1838 and 1848 by LeBaron Putnam and others, who were owners of a mill on the stream below.

In 1838 John Battelle, Jr., and John Shumway were the owners of the land which at the time of the taking belonged to the petitioner; Joseph Hubbard was the predecessor in title of Kronoff;

and the Eagleville Manufacturing Company was the predecessor in title of LeBaron Putnam. Battelle and Shumway permitted the Eagleville Manufacturing Company to erect a dam, and referees afterwards made an award of damages to the landowners.

On May 9, 1849, Putnam, then owner of the mill, and Hannah Battelle and Abigail Shumway, the owners of the land of the petitioner taken by the city, entered into an agreement, a copy of which is made a part of the record and is marked "Exhibit C."

From the date of the agreement until the takings, the dam and reservoir were controlled by and for the benefit of Putnam and his successors in the ownership of the mills below; and they annually paid to Hannah Battelle and Abigail Shumway and to their successors in ownership $4 per annum, and such payments were regularly made to the petitioner until the taking in 1915. At no time did the petitioner or her predecessors in title pay or offer to pay to Putnam or his successors in title $800 as provided in the agreement; and there is no evidence of a similar agreement having been made between Putnam and the predecessors in title of Kronoff.

The parties have agreed that the petitioner's damages by reason of the taking amount to $1,750 without reference to the effect of the instruments set forth in exhibits A, B and C, and the question is, whether as matter of law the effect of those instruments shall be considered as an element of damages in addition to the sum of $1,750.

It is plain that if, upon the evidence, the mill owners had as against the petitioner an irrevocable right to maintain the dam and reservoir, then the petitioner's damages are limited to $1,750. If, on the other hand, as matter of law from the documents above referred to, the mill owners did not have an irrevocable right to maintain the dam as against the petitioner and she is deprived of a valuable property right or interest in her land by the takings, then she is entitled to recover whatever damages she may have sustained in addition to $1,750.

The recent decision in *Kronoff* v. *Worcester*, 234 Mass. 254, is not decisive of the rights of the petitioner. There was no evidence in that case of a similar agreement having been made between Putnam or his successors in title and the predecessors in

title of Kronoff. Upon that agreement the contention of this petitioner is largely founded.

It is plain that the agreement is something more than a mere license; it is in the form of an indenture, is under seal and binds the parties and their respective heirs and assigns. The rights created could be terminated by either party at any time in accordance with the terms of the agreement, and there is nothing in its provisions that imposes any restraint upon alienation by the owner of the land. The rule against perpetuities is not violated. *Mills* v. *Smith*, 193 Mass. 11, 17. The case of *Eastman Marble Co.* v. *Vermont Marble Co. ante*, 138, is distinguishable from the case at bar.

The agreement was not intended merely as a personal contract between the parties. On the contrary the heirs and assigns of each succeed with the estate to the same rights and liabilities that their predecessors in title had, and the covenants run with the land. *Morse* v. *Aldrich*, 19 Pick. 449. *Savage* v. *Mason*, 3 Cush. 500. *Bronson* v. *Coffin*, 108 Mass. 175. *King* v. *Wight*, 155 Mass. 444. *Whittenton Manuf. Co.* v. *Staples*, 164 Mass. 319, 327. The rights of the petitioner to the benefit of the covenants have not been lost by laches, but were vested in her at the time of the takings by the city.

It follows from what has been said that at the time the land was taken there was incident to it a right or interest under the agreement which ought to be considered in estimating the fair market value of the land taken, and which might enhance such value above the sum of $1,750. That right arises by reason of the terms of the agreement by which the petitioner could at any time terminate it and extinguish the claim upon her land by the payment of $800; Putnam and his heirs and assigns covenant that upon such payment he and they "will relinquish all his right and title and interest in the said dam and give the same up to said Battelle and Shumway or their heirs, executors, administrator or assigns forever and give good sufficient deed to effect the same."

This covenant amounts to an agreement on the part of Putnam and his heirs and assigns to release their right, title and interest in that portion of the dam built on the land of the owner, and to release the right of Putnam to maintain the dam; it cannot properly be construed as a covenant to release any right in the dam

standing on the Kronoff land, or to release a right there to maintain the dam. In other words, we construe this part of the instrument as an agreement to release only the rights therein acquired by Putnam to maintain the dam on the land now owned by the petitioner.

It follows that an assessment of the petitioner's damages in this connection is limited by the covenant to the value of the right relating to a release of that part of the dam which rested on her land; she is not entitled to the value of any flowage rights that existed from the maintenance of the entire dam. As the land was taken for a public use, the city was not bound to pay by way of compensation more than its entire value as a whole. *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1.

The facts in this case distinguish it from *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad,* 209 Mass. 298, where it was held that an option given to the lessee to purchase the estate taken and the exercise of such an option would secure "not an extension of the leasehold estate but a new estate of a different kind. The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land," but that after the taking, although the lessee can no longer at his election buy the land, "he can at his election buy the fund into which in equity the land has been converted by the exercise of the power of eminent domain."

In the case at bar the petitioner could terminate the rights acquired by Putnam and his heirs and assigns. This was not a right to acquire a new estate of a different kind, and there is no fund into which the property affected by her right has been or can be converted. The petitioner is, therefore, without any remedy unless she can secure the value of the right of property in question in this proceeding.

We are of opinion that as matter of law the effect of the documents, Exhibits A, B and C, properly construed should be considered as an element of damages suffered by the petitioner by reason of the takings by the city, in addition to the sum of $1,750; and that in accordance with the stipulation of the parties the total amount of damages to be awarded should be determined by an assessor to be appointed by the Superior Court, his finding of fact to be final.

So ordered.

MARGARET SOLOVICOS *vs.* MATTIE H. J. MACLACHLAN.

Essex. October 22, 1920. — October 25, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Land Court, Appeal, Finding by judge. *Attachment.*

Upon an appeal to this court from a decree of the Land Court upon a petition for the registration of the title to land, only questions of law are open; and a finding of fact by the trial judge without a report of evidence will not be reviewed.

An attachment of real estate made by virtue of a writ which never was entered in court has no validity although it is not discharged of record.

PETITION, filed in the Land Court on September 29, 1919, for registration of the title to land in Salem.

In the Land Court the petition was heard by *Davis*, J. His decision was as follows:

"This is a very distressing case. The petitioner claims title under an execution sale. The respondent through sheer neglect in taking efficient steps for her protection has lost, for a debt originally amounting to about $500 at the most and as she claims to only $200, real estate worth something over $4,500. The respondent has appeared throughout all proceedings *pro se*, and, until this case came to trial, has allowed everything to go by default. The petitioner, on the other hand, is a purchaser for value and, although warned by the respondent that she claimed the property, has nevertheless, acting under advice, improved the property to the extent of several thousand dollars. The only matter before this court, however, is as to the validity of the petitioner's title. If that is valid, the petitioner is entitled to a decree. This court has no other power in regard to the matter.

"The land in question was owned by the respondent's first husband, Thomas E. Jewett, of Salem, who died on February 13, 1911, testate, leaving all of his property to the respondent who probated the will, and on March 20, 1911, was appointed executrix and duly qualified. Her inventory showed personal estate valued at over $12,000, and real estate inventoried at $4,800. The estate was assessed for taxes on personal property in 1914 to the amount of $248, and in 1915 for $260.40. The respondent claims that the

assessment was too large, asserting that a portion of the personal property was in tax exempt securities. She wrote letters to the assessors in regard to the matter, but neither paid the taxes nor applied for abatement. Later she wrote letters to the county commissioners in regard to the matter, but failed to file either a formal application for abatement, or complaint appealing from a refusal of the assessors to grant the same. The collector then brought a suit against her for said taxes in the Superior Court, and attached the real estate. The respondent appeared *pro se* in that action, but did not answer. The plaintiff then made a motion to default her for failure to file answer, and the respondent attended for the purpose of being heard on the motion but it was not reached. She failed to attend when the motion was reached, and was defaulted. She did see the city solicitor and asked for delay, but it was not granted. The case then went to judgment, and execution was issued in the sum of $901.90 and costs. The execution was levied and notice of execution sale was given. The respondent then went to Salem and stayed until after the sale. She interviewed the mayor and attempted to have the sale postponed, and it was adjourned for one week. When the sale took place she was present. The property was purchased at the execution sale by one Sheehan for $1,000, and he received a sheriff's deed on December 21, 1917. The balance between the amount of the execution and costs and the $1,000 was paid over by the sheriff to the respondent. It seems almost incredible that the respondent should not have received advice or assistance from some one that would have resulted either in payment of the execution or in redemption from the execution sale. There was ample security. She did communicate with Sheehan who 'sympathized' with her, but otherwise gave her no relief. On April 3, 1919, Sheehan conveyed a portion of the property, being the land now in question, to the petitioner, who has given a mortgage back to Sheehan for $4,000.

"The petitioner has submitted the record title, and proved such facts outside the record as are necessary to the validity of the sale. The only objection suggested by the respondent is that an attachment made against her for $1,000 on January 4, 1915, upon a writ in favor of one Wadsworth, dated December 21, 1914, and returnable in the Superior Court in Suffolk County on the first Monday

of February, 1915, remained undischarged of record in the registry of deeds until January 2, 1919, when a certificate by the clerk of the Superior Court of non-entry of the said suit was filed in the registry of deeds. This attachment was not outstanding, however, in fact or in law, but was dissolved by failure to enter the action in which it was made. I am unable to find any invalidity in the execution sale or in the record title. There must be an entry of decree for the petitioner."

A decree accordingly was entered for the petitioner. The respondent appealed.

The case was submitted on briefs.

M. H. J. MacLachlan, respondent, *pro se*.

G. C. Richards, for the petitioner.

BY THE COURT. This case comes before us on an appeal from the Land Court. Only questions of law raised on the record can be considered. The petitioner claims the real estate in question through an execution sale, respecting which the Land Court judge was unable to discover any invalidity and he found the title to be in the petitioner. Manifestly a pre-existing attachment made upon a writ never entered in court, although undischarged on the record of the registry of deeds, was no bar to the subsequent attachment and sale through which the title of the petitioner is derived. The present apparent misfortune of the appellant is due to failure to take advantage seasonably of the right of redemption afforded her by the statutes. No substantial question of law is disclosed upon this record.

Order for decree affirmed.

SAMUEL ALPERT *vs.* JOSEPH B. ELLIS.

Bristol. October 25, 1920. — October 25, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Motor vehicle, In use of highway. *Practice, Civil*, Ordering verdict.

Where, at the trial of an action for personal injuries received when the plaintiff was run into from behind by a motor car driven by the defendant on a country road, there was evidence that the collision occurred on a moonlit night in February when the plaintiff, unaware of the proximity of the motor car until he was

struck, was walking in a regular course along his right hand side of the highway, which was frozen and free from snow or ice and that the defendant gave no warning of his approach, the questions, whether the defendant was negligent and whether negligence of the plaintiff contributed to the injury, are for the jury, although the defendant testified that he did not see the plaintiff because he was blinded by lights of an approaching electric car and because the plaintiff's "clothing was very nearly the same color as the road."

TORT for personal injuries received when the plaintiff was run into from behind by a motor car driven by the defendant. Writ dated April 9, 1919.

In the Superior Court the action was tried before *Sisk*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in his favor on the grounds that on all the evidence the defendant was not negligent and that the plaintiff was not in the exercise of due care. The motion was denied. The jury found for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

H. S. Avery, for the defendant.

J. H. Leedham, Jr., for the plaintiff, was not called upon.

BY THE COURT. This is an action of tort to recover compensation for personal injuries received by the plaintiff at about seven o'clock on a moonlit February night, while a pedestrian upon a highway, by reason of being run down from behind by the driver of an automobile. There was evidence tending to show that the plaintiff was walking in a regular course along the right hand side of a frozen country road free from snow or ice, and was unaware of the proximity of the automobile until he was struck. The defendant gave no warning of his approach. He testified that he did not see the plaintiff because blinded by lights of an approaching electric car and because the plaintiff's "clothing was very nearly the same color as the road." The case rightly was submitted to the jury. *Powers* v. *Loring*, 231 Mass. 458.

Exceptions overruled.

JOSEPH K. WORDELL, administrator, *vs.* BENJAMIN W. GRIM, trustee.

Bristol. October 26, 1920. — October 26, 1920.

Present: RUGG, C. J., DE COURCY, CARROLL, & JENNEY, JJ.

Probate Court, Exceptions. *Attorney at Law.*

An exception to a refusal by a single justice, hearing an appeal from a decree of the Probate Court modifying a final account of an executor by lessening the amount allowed for services and disbursements of counsel, to rule that the amounts charged in the account for such items were not unreasonable, brings to this court no question of law.

APPEAL from a decree of the Probate Court for the county of Bristol upon the first and final account of the executrix of the will of George W. Hall, late of Westport, wherein, among other modifications of the account, items for services and disbursements of the counsel for the executrix amounting to $9,427.65 were reduced to $1,447.68.

The appeal was heard by *Crosby*, J. The appellant asked for rulings of law, all of which were given excepting the ninth, which was refused, and which was as follows:

"9. Where, as in the case at bar, a contested will made by a person under guardianship as a *non compos mentis* is admitted to probate after an appeal, adjustments have been made of the controversies arising out of the conditions of the estate, by one of which real estate of the value of $4,000 or more has been secured to the estate, and from $2,400 to $4,700 saved to the estate on charges by a guardian, and special administrator and his attorneys, and about $500 on other accounts, the entire estate aggregating more than $30,000, and the services extending over a period of more than three years, the sum paid as counsel fees and the charges for services and for additional counsel fees in this account are not unreasonable."

The single justice ordered a decree affirming the decree of the Probate Court; and the appellant alleged exceptions.

A. G. Weeks, for the appellant, submitted a brief.

R. C. Estes, for the trustee.

BY THE COURT. This case comes before us on exceptions taken before a single justice on the trial of an appeal from a decree of the Probate Court allowing with modifications an account of an executrix. The chief issue was the value of legal services rendered by an attorney in the proof of the will and the settlement of the estate. The single justice found that it was difficult to determine the amount of time spent by the attorney in connection with the various affairs of the estate and found on all the evidence that the sum allowed by the judge of the Probate Court was reasonable and adopted it as his own finding. The ninth request of the appellant involved no ruling of law but related wholly to facts. Its denial was in no way inconsistent with the granting of all the several requests for rulings of law presented by the appellant. The record discloses no question of law for our decision. The whole controversy between the parties was purely one of fact. The findings made are not irrational and might have been made on the evidence.

Exceptions overruled.

FREDERICK SCIOLA'S CASE.

Berkshire. September 23, 1920. — October 28, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Procedure: appeal to Superior Court, appeal to Supreme Judicial Court; Evidence. *Evidence*, Judicial notice.

Under St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, while it is a condition precedent to the jurisdiction of the Superior Court to enter a decree upon a decision of the Industrial Accident Board that copies of the order or decision of that board shall have been filed in the Superior Court and that such copies shall be certified, such copies need not be filed within ten days after the decision of the board unless it is desired to appeal from the decree of the Superior Court to be entered thereon.

The Superior Court has no jurisdiction to enter a decree in such a proceeding if the copies of the proceedings filed with it are not certified.

At a hearing by the Industrial Accident Board of the question, whether injuries received by an employee, who was a claimant in proceedings under the workmen's compensation act, were caused by the serious and wilful misconduct of the employer so that the claim came under the provisions of St. 1911, c. 751, Part II, § 3, the board can take judicial notice of general safety rules and regulations and

machinery standards established by the State board of labor and industries under St. 1913, c. 813, as amended by St. 1916, c. 308.

A failure by an employer to install a safety device upon a machine as required by the general safety rules and regulations and machinery standards of the State board of labor and industries, adopted under the authority of St. 1913, c. 813, if it results in injury to an employee, does not as a matter of law constitute "the serious and wilful misconduct" on the employer's part referred to in St. 1911, c. 751, Part II, § 3.

While, ordinarily, the remanding by the Superior Court of a claim under the workmen's compensation act to the Industrial Accident Board for further hearing is within the discretionary power of the court, a decree so remanding a case may be reviewed and should be reversed if its sole purpose is to direct the board's attention to matters of fact which the board already has fully considered or to require a reconsideration of rulings of law which were correct.

The insurer in proceedings under the workmen's compensation act has a right to appeal from an interlocutory decree of the Superior Court remanding the claim to the Industrial Accident Board for further hearing upon certain evidence specified in the decree, where it appears that the certified copies, required by St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, as a basis for a decree of the Superior Court, were filed in the Superior Court more than ten days after notice of the decision of the Industrial Accident Board, and that consequently there could be no appeal from a final decree to be entered in the matter by the Superior Court.

CERTIFICATION, filed in the Superior Court in proceedings under the workmen's compensation act, of a decision of the Industrial Accident Board that the evidence did not warrant a finding under St. 1911, c. 751, Part II, § 3, that the injury received by the claimant was due to serious and wilful misconduct on the part of the employer or of any one exercising superintendency.

It appeared that the claimant's finger was cut off while he was working on a carding machine which, in violation of the safety rules and regulations and machinery standards of the State board of labor and industries, adopted under the authority of St. 1913, c. 813, was not protected by a safety guard. The employee asked the board to rule as follows:

"1. The employer was subject to the provisions of St. 1913, c. 813, and amendments thereto.

"2. The employer was subject to the safety rules and regulations and machinery standards of the State board of labor and industries as contained in Industrial Bulletin No. 9 and which were adopted by said board on March 20, 1917.

"3. If the employer failed to install a safety device as described in Division J. of the 'Safety Rules and Regulations and Machinery

Standards' of the board of labor and industries and such failure resulted in the claimant's injury, then the employer was guilty of 'serious and wilful misconduct' as defined in the workmen's compensation act.

"4. If the employer failed to install a safety device as described in Division J. of the 'Safety Rules and Regulations and Machinery Standards' of the board of labor and industries and such violation was contrary to St. 1913, c. 813, and if such omission resulted in the claimant's injury, then the employer was guilty of 'serious and wilful misconduct' as defined in the workmen's compensation act.

"5. If the employer failed to conform to the rules and regulations of the State board of labor and industries as required by St. 1913, c. 813, and continued to employ the claimant to operate a machine for more than a year, which machine was not fitted with the safety devices required by the safety rules and regulations of the board of labor and industries, and under the direction of a superintendent who knew that an employee had injured his hand upon a similar machine during the first part of the year, such conduct on the part of the employer is of a criminal nature and is the intentional doing of something with the knowledge that it is likely to result in serious injury to the employee."

The board granted the first and second requests for rulings and refused the others.

Proceedings in the Superior Court are described in the opinion. The case is before this court solely upon an appeal from an interlocutory decree of the Superior Court remanding the case "to the Industrial Accident Board for further hearing in order that the general safety rules and regulations and machinery standards established by the State board of labor and industries may be received in evidence and considered upon the issue as to whether the injury sustained by the employee was due to serious and wilful misconduct on the part of the subscriber."

St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, reads as follows: "Section 11. Any party in interest may present certified copies of an order or decision of the board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the board, and all papers in connection therewith, to the Superior Court for the county in which the injury

occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact, or where the decree is based upon a decision of a member or a memorandum of agreement, and that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the Industrial Accident Board ending, diminishing or increasing a weekly payment under the provisions of Part III, section twelve, the court shall revoke or modify the decree to conform to such decision."

The case was submitted on briefs.

G. Gleason, for the employer.

R. M. Stevens, for the employee.

JENNEY, J. Frederick Sciola, while in the employ of the W. E. Tillotson Manufacturing Company, on May 24, 1918, received an injury in the course of his employment. It is agreed that he was entitled to compensation under the provisions of the workmen's compensation act. On October 31, 1918, a member of the Industrial Accident Board after due hearing so found. There was no finding that the injury was caused by the serious and wilful misconduct of the employer. A claim of review having been filed, the Industrial Accident Board on November 23, 1918, affirmed and adopted the decision of the single member. The only issuable question, as clearly appears from that decision, was whether the injury had been caused by the serious and wilful misconduct of the employer. On November 30, 1918, the employee filed in the Superior Court uncertified copies of the decision of the board and all papers in connection therewith, and on September 3, 1919, a decree was entered in that court reciting that the injury was due to the serious and wilful misconduct of the employer and ordering the payment of double damages. It did not appear whether the filing of uncertified copies was intentional or was due to inadvertence or mistake. On September 16, 1919, the employer and the insurer appealed from said decree, and on September 19, 1919,

they moved that it be vacated for the following reasons: (1) that the evidence presented did not warrant a decree that the injury received was due to serious and wilful misconduct for which the employer was responsible; (2) that neither the insurer nor the employer had sufficient notice of the hearing on the motion for the issuance of said decree and no opportunity to be present at the hearing thereon; and (3) that no certified copy of the decision of the Industrial Accident Board was filed in the Superior Court as required by law.

On October 2, 1919, a decree was entered vacating the decree of September 3 for the reason stated, that "no certified copy of the decision of the single member of the Industrial Accident Board or no certified copy of the decision of the Industrial Accident Board was presented to the court as required by law." No appeal was taken from this decree, and all parties have since proceeded on the basis that the decree ordering the payment of compensation was no longer in force.

On October 1, 1919, duly certified copies of the proceedings before the Industrial Accident Board and of its decision were entered in the Superior Court, but were not so entered under any order of the court permitting them to be filed *nunc pro tunc* or in amendment of the papers previously presented, assuming that such order could properly have been made. See *Perkins* v. *Perkins*, 225 Mass. 392.

The workmen's compensation act (St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7) provides that "Any party in interest may present certified copies of an order or decision" of the Industrial Accident Board and "all papers in connection therewith, to the Superior Court," whereupon "said court shall render a decree in accordance therewith." No appeal is permitted upon questions of fact or from a decree "based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board." The filing in court of the required papers as a part of its records is a compliance with the statute. *McPhee's Case*, 222 Mass. 1. It is clear that the filing of the certified copy of the decision within ten days is not a condition to the acquirement of jurisdiction, but that the limitation of time relates only to cases where the parties may desire to appeal

generally from the decree of the Superior Court. In many instances the required papers are never filed in the Superior Court and consequently no decree is entered in that tribunal, because the decision of the Industrial Accident Board is generally complied with without any decree of an appellate tribunal. However, such a necessity may arise even after a considerable time has elapsed; and there is no limitation as to the time of presentation, but merely the express provision that there shall be no appeal if the required papers are not presented within ten days. In such case it is the duty of the Superior Court to enforce the award of the board, unless there is legal reason to the contrary. *Young* v. *Duncan*, 218 Mass. 346. *Hunnewell's Case*, 220 Mass. 351, 353. *Brown's Case*, 228 Mass. 31. *Dempsey's Case*, 230 Mass. 583, 587. Although no appeal lies, "In cases of errors of law apparent on the face of the record, they may be corrected by certiorari, or perhaps by some other appropriate remedy." *Young* v. *Duncan*, *supra*, at page 354. *Swan* v. *Justices of the Superior Court*, 222 Mass. 542.

The statutory requirement as to the presentation of certified copies is a condition precedent to the jurisdiction of the Superior Court.

As was said in *Commonwealth* v. *Dunham*, 22 Pick. 11, 17, the right of appeal is conditional and depends "upon a compliance with conditions requisite to a due administration of the law, and necessary to prevent disorder and an evasion of justice." Where such conditions have not been complied with, the "claim of an appeal . . . [is] inoperative and void." The clear words of the statute require the submission of copies which bear the requisite evidence of authenticity. *Tibbetts* v. *Handy*, 145 Mass. 537. *McPhee's Case*, *supra*. *Humphrey's Case*, 226 Mass. 143. It has been held that full compliance with the conditions of the statute is an essential prerequisite "to the jurisdiction" of the Industrial Accident Board and that "its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel." *Levangie's Case*, 228 Mass. 213, 217. Like limitations prevail upon the jurisdiction of the Superior Court on appeal. *Sterling's Case*, 233 Mass. 485. See also *Martin's Case*, 231 Mass. 402; *Littlejohn* v. *Littlejohn*, *ante*, 326.

It follows that the Superior Court was without jurisdiction to enter the decree of September 3, and that said decree was of no effect. Because of its invalidity, no appeal could be taken therefrom. While it was decided in *Sterling's Case, supra,* that petitions and motions to vacate a void decree were denied rightly for procedural reasons, the court is not bound to give any effect to a decree entered wholly without jurisdiction. *Fourth National Bank of Boston* v. *Mead,* 214 Mass. 549. *Eaton* v. *Eaton,* 233 Mass. 351, 364.

On April 15, 1920, an interlocutory decree was entered remanding the case to the Industrial Accident Board for further hearing, in order that the general safety rules and regulations and machinery standards established by the State board of labor and industries, hereinafter referred to as the rules, might be received in evidence and considered upon the issue of whether the injury sustained by the employee was due to serious and wilful misconduct on the part of the subscriber.

The employer's appeal from this decree is now presented for decision. The questions to be decided are: (1) whether the trial judge had the right to make this order; and (2) whether the appeal is properly before this court.

When the proper papers had been entered, although more than ten days from the filing of the decision of the Industrial Accident Board had elapsed, the case was properly before the Superior Court for such action as the statute permitted. No authority, however, existed to review or to disturb the findings of fact made by the board if they were founded on warrantable evidence. *Pigeon's Case,* 216 Mass. 51. *Gorski's Case,* 227 Mass. 456. *Fitzgibbon's Case,* 230 Mass. 473. *Moran's Case,* 230 Mass. 500. *Mallory's Case,* 231 Mass. 225. *McCarthy's Case,* 231 Mass. 259. Error in the admission or exclusion of evidence is not ground for reversal unless necessary to protect substantial rights. *Beckles's Case,* 230 Mass. 272. A like result must follow where there has been failure to offer evidence. See *Fierro's Case,* 223 Mass. 378, 382; *Gorski's Case, supra.*

By St. 1913, c. 813, as amended by St. 1916, c. 308, the State board of labor and industries was instructed to investigate employments and places of employment, to determine what suitable safety devices and other reasonable means and requirements for

the prevention of accidents should be adopted, and to make "reasonable rules, regulations and orders for the prevention of accidents." The statute further provides that a violation of "any reasonable rule, regulation, order or requirement" so made shall be punished by a fine of not more than $100 for each offence. No question can be made as to the right of the Legislature to delegate its powers by authorizing the making of such rules. *Commonwealth* v. *Slocum*, 230 Mass. 180, 190, and cases there collected.

The Industrial Accident Board could take judicial notice of these rules. *Carroll's Case*, 225 Mass. 203. *Walsh's Case*, 227 Mass. 341. *Caha* v. *United States*, 152 U. S. 211, 221. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 190 U. S. 301. *Low* v. *Hanson*, 72 Maine, 104. *State* v. *Southern Railway*, 141 N. C. 846. *Smith* v. *Shakopee*, 44 C. C. A. 1. *Bruce* v. *United States*, 120 C. C. A. 370. It appears that their effect was actually considered by the board, for, at the request of the employee, it ruled that the employer was subject to the provisions of the statute under which they were made and to the rules themselves, and refused to rule as requested that, as matter of law, the failure to install safety devices as described in division "J" thereof constituted serious and wilful misconduct as defined by the statute, if such omission resulted in injury. Whether an injury was caused by serious and wilful misconduct frequently is a question of fact. The board, having already considered these rules, ought not to have been ordered to reconsider their decision so far as it was one of fact. If the action of the board be regarded as a ruling of law, it was correct. Upon the evidence the employee was not entitled to double damages within the rule laid down in *Burns's Case*, 218 Mass. 8; *Riley's Case*, 227 Mass. 55; and *Beckles's Case*, *supra;* and the rulings of the board were correct.

It has been held that where justice requires it, a broad power exists to recommit to the Industrial Accident Board. Recommittal has been ordered for the purpose of correction and amplification of the record where it was incomplete, *Doherty's Case*, 222 Mass. 98, *Brown's Case*, *supra;* for the introduction of further evidence when it did not appear that any evidence had been offered on a material question and where no finding had been made with reference to that question, *Fierro's Case*, *supra*, *Carroll's Case*,

supra; and where it appeared that the case had not been fully heard on an important issue, *Comerford's Case,* 224 Mass. 571.

While ordinarily the recommittal of a case to the Industrial Accident Board for further hearing is within the discretion of the trial judge, where it appears that the action was taken solely for the purpose of directing a reconsideration of correct rulings of law or of findings of fact based on due consideration of all questions of law or evidence, the action of the judge may be reviewed.

It is contended, however, that the decree of recommittal should not now be considered, because it relates solely to an interlocutory matter which should not be decided before the entry of a final decree. *Keohane's Case,* 232 Mass. 487. *Gould's Case,* 215 Mass. 480, 483. But as was said in *Keohane's Case,* the final decree contemplated is one from which an appeal will lie. The practice follows that in equity, and unless otherwise provided, an appeal lies from both interlocutory and final decrees. *Gould's Case, supra. Keohane's Case, supra.* R. L. c. 159, §§ 19, 25. St. 1911, c. 284, § 1. Where the statute provides that there can be no appeal from a final decree, we are of opinion that to prevent error there may be an appeal from an interlocutory decree, at least where the appeal brings up questions of law not involving the final disposition of the case. The rule that an appeal from an interlocutory decree will not be considered before the entry of a final decree does not preclude the consideration of such an appeal where no appeal lies from a final decree. The decree of recommittal must be reversed.

So ordered.

MARY E. PARSONS *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 8, 1920. — November 9, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Street railway.

Where, at the trial of an action against a street railway company for personal injuries received by a child three years old, who, when upon a public street unattended by any person on a pleasant October day, was run into by an electric street car operated by the defendant, the only evidence tending to show how

the accident happened was that a policeman heard a scream, saw the car stop, and, on running about fifty feet, found the plaintiff under the fender close to the front wheel of the car with her face bruised and her clothes over her head, and that he noticed no motor cars, wagons or other electric cars on the street and heard no sound of a gong, a verdict properly may be ordered for the defendant, there being no evidence of negligence of the defendant or of its servants or agents.

TORT for personal injuries. Writ dated December 29, 1916.

In the Superior Court, the action was tried before *Hall*, J. Material evidence is described in the opinion. At the close of the evidence, by order of the trial judge, the jury found for the defendant; and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

A. E. Pinanski & G. E. Morris, for the defendant, submitted a brief.

BY THE COURT. The plaintiff, who at the time of the injury complained of was three years old, was upon a public street unattended by any person. The only evidence tending to show how the accident happened was that a policeman on a pleasant October day heard a scream, saw an electric car of the defendant stop, and on running about fifty feet found the plaintiff under the fender close to the front wheel of the car with her face bruised and her clothes over her head. He noticed no automobiles, wagons or other electric cars on the street, and heard no sound of a gong. This evidence wholly fails to show any negligence on the part of the defendant or its servants or agents. *Bigwood* v. *Boston & Northern Street Railway*, 209 Mass. 345. *Stangy* v. *Boston Elevated Railway*, 220 Mass. 414. *Raymond* v. *Worcester Consolidated Street Railway*, 222 Mass. 396. *McNiff* v. *Boston Elevated Railway*, 234 Mass. 252. *Anger* v. *Worcester Consolidated Street Railway*, 231 Mass. 163. *Boyle* v. *Worcester Consolidated Street Railway*, 231 Mass. 184. *Kelley* v. *Boston & Northern Street Railway*, 223 Mass. 449. *Donahue* v. *Massachusetts Northeastern Street Railway*, 222 Mass. 233.

Exceptions overruled.

FANNIE S. CHASE *vs.* ARTHUR H. RUSSELL, trustee.

Suffolk. November 9, 1920. — November 10, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Probate Court, Appeal, Jurisdiction. *Appeal*, Moot question. *Supreme Judicial Court.*

A banking institution at the request of a beneficiary under a will petitioned for its appointment as a co-trustee under the will to act with one who alone was named as trustee therein and had been appointed and had qualified. The banking institution was named in the will as a successor to the trustee therein named. By order of the judge of the Probate Court a decree was entered dismissing the petition, the judge stating that, "if the prayer of the petition was within the discretion of the court . . . [he] . . . would not grant it, but that, as a matter of law the court had exhausted its power by the previous appointment" of the trustee named in the will. The beneficiary appealed. *Held*, that the decree must be affirmed, as the appeal sought to raise a question wholly moot, and did not present a question of law proper for this court to determine.

PETITION, filed in the Probate Court on March 19, 1920, by the Boston Safe Deposit and Trust Company at the request of beneficiaries of a trust under the will of Walter G. Chase, late of Boston, seeking the appointment of the petitioner as a co-trustee to act with the trustee who was named in the will as the sole trustee.

By the provisions of the will constituting the trust, Arthur H. Russell, Esquire, was named as trustee, and, in the event that he should die before the testator or should be unable or unwilling to serve as such trustee, or should die or become unable or unwilling to serve before the duties incident to the trust were completed, the petitioner was nominated to succeed him.

The petition was heard by *Grant*, J., who "ruled on the evidence, which neither party requested to have taken down by a commissioner, that if the prayer of the petition was within the discretion of the court, . . . [he] . . . would not grant it, but that as a matter of law the court had exhausted its power by the previous appointment of said Russell whose title was derived from the instrument itself." He "also ruled that the court under the

statutes has no power to make an appointment except where the testator has omitted in his will to appoint a trustee or where the trustee declines, resigns, dies or is removed before the objects of the trusts are accomplished and such instrument makes no adequate provision for supplying the vacancy."

A decree dismissing the petition accordingly was entered, and Fannie S. Chase, mother of the testator and a beneficiary under the trust, appealed.

The case was submitted on briefs.

N. U. Walker, for the petitioner.

E. M. Moore, for the respondent.

RUGG, C. J. This is a petition by the Boston Safe Deposit and Trust Company, brought at the request of beneficiaries under the will of Walter G. Chase, for appointment as co-trustee under said will with Arthur H. Russell who was named in said will as trustee and duly appointed by the Probate Court and qualified as such on June 12, 1919, and who is still serving as trustee. The probate judge dismissed the petition and stated in his report that "if the prayer of the petition was within the discretion of the court, I would not grant it," and then ruled as matter of law that he had no power to make an appointment under the circumstances disclosed. The question of law sought to be raised on this record is wholly moot and can have no effect upon the rights of the parties. This court is not established for the discussion and declaration of opinion concerning such questions. *Sullivan* v. *Secretary of the Commonwealth*, 233 Mass. 543. It is too clear for discussion that even if the Probate Court had power, the making of the appointment rested in sound judicial discretion.

Since it appears that on that ground the petitioner could not prevail whatever the law may be, there is no question of law to be decided.

Decree affirmed.

SOLOMON SHINE *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Norfolk. November 11, 1920. — November 11, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Railroad, *Res ipsa loquitur*. *Evidence*, Matter of common knowledge, Presumptions and burden of proof.

It is a matter of common knowledge that under present conditions a coal burning locomotive cannot draw a train without emitting cinders and smoke.

It is not negligence on the part of a railroad corporation not to keep windows and doors of passenger cars closed in warm weather in order to exclude cinders.

At the trial of an action against a railroad corporation for personal injuries the evidence, in its view most favorable to the plaintiff, tended to show that on a warm pleasant September afternoon the plaintiff boarded a train at Taunton for Boston and took a seat next to an open window in a smoking car, the doors and windows of which were open; that, after the train began to move, "there was a lot of smoke and cinders and fire blowing in," and he "had a stinging, burning sensation" in his eye; that later "a speck — some foreign substance" was removed from the eye. There was no evidence to show by whom the doors and windows were opened. *Held*, that the doctrine of *res ipsa loquitur* did not apply, and that the evidence would not warrant a finding of negligence on the part of the defendant.

TORT for personal injuries. Writ dated March 5, 1918.

In the Superior Court the action was tried before *Raymond*, J. Material evidence is described in the opinion. The judge at the close of the evidence ordered a verdict for the defendant and reported the case to this court for determination.

H. H. Pratt & J. S. Richardson, for the plaintiff, submitted a brief.

Joseph Wentworth, for the defendant.

BY THE COURT. This is an action of tort to recover compensation for injuries received by the plaintiff through the alleged negligence of the defendant while he was a passenger upon one of its trains. The evidence in its aspect most favorable to the plaintiff tended to show that a little after four o'clock on a warm pleasant September afternoon he boarded a train at Taunton for Boston, and took a seat next to an open window in the smoking car, the doors and windows of which were open. He testified: "I received an injury to my eye. I felt something hit my eye. After the train began to move there was a lot of smoke and cinders and fire blowing in. I had a stinging, burning sensation in my eye."

This occurred five or ten minutes after the train started. Another witness testified that smoke and quite a few cinders from the locomotive were coming in at the front door of the car and that "cinders were blowing around in the air." Later, "a speck — some foreign substance" was removed from the plaintiff's eye and he suffered serious injury.

This evidence discloses no negligence on the part of the defendant. It is common knowledge that under present conditions coal burning locomotives cannot draw a train without emitting cinders and smoke. There is nothing to show by whom the windows and doors of the car were opened. *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. *Hunt* v. *Boston Elevated Railway*, 201 Mass. 182. It is not negligence on the part of the defendant not to keep windows and doors of passenger cars closed in warm weather in order to exclude cinders. The doctrine of *res ipsa loquitur* has no application to the facts here disclosed. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572. *Kelsey* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 64. *Searles* v. *Manhattan Railway*, 101 N. Y. 661. *Wiedmer* v. *New York Elevated Railway*, 114 N. Y. 462. *Carney* v. *Boston Elevated Railway*, 212 Mass. 179.

Judgment for the defendant.

JOHN E. NOLAN & others *vs.* BOSTON FIREMEN'S RELIEF FUND.

Suffolk. November 16, 1920. — November 19, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

The Boston Firemen's Relief Fund. Boston. Mandamus.

A member of the repair and construction division or of the veterinary service or of the fire alarm branch of the fire department of the city of Boston is, under St. 1909, c. 308, as amended by St. 1911, c. 134, a member of "said department" and entitled to vote for the twelve members of that department, who, with the fire commissioner, constitute The Boston Firemen's Relief Fund; and if the corporation denies to him that right, a writ of mandamus may be issued upon his petition to compel the corporation to recognize it.

It is not a condition precedent to the granting of the petition for a writ of mandamus above described that the petitioner shall have made an express demand upon the corporation for a recognition of his right if it appears that such a demand would have been futile.

PETITION, filed on April 1, 1918, by John E. Nolan, William H. Baldwin, Dennis J. Burnett and Daniel F. O'Brien, alleging themselves to be members of the fire department of the city of Boston and assigned to duty in the branches of the department known as the repair and construction division, veterinary service, and fire alarm branch, for a writ of mandamus directing the corporation, The Boston Firemen's Relief Fund, "to restore them to the full exercise and enjoyment of all their rights, privileges, and franchises as members thereof, and not further deny, interfere with, or abridge them in any shape or manner," the petitioners alleging that, previous to the annual meeting of 1913, they had been notified that they would not be recognized as members of the corporation and had not been permitted to vote or to take part in the meetings of the corporation.

The answer denied that the petitioners were members of the fire department of the city of Boston and alleged that the respondent "has never refused to recognize, and has never denied to the petitioners or any of them, any lawful right, privilege, benefit, or franchise which the petitioners, or either of them, have duly made, filed, or presented to the respondent."

The case was referred to an auditor. Material facts found by him are described in the opinion. After the filing of his report, the case at the request of the respondent was reserved for determination by the full court upon the pleadings, the auditor's report and exhibits referred to therein and a stipulation of the parties that "it was in evidence before the auditor that up to the year 1909 no question had ever been raised by any one that the members of the fire alarm branch were not members of the fire department of the city of Boston."

The case was submitted on briefs.

E. Carr & J. F. Barry, for the petitioners.

H. Parker & E. H. Hewitt, for the respondent.

BY THE COURT. This petition for a writ of mandamus, although not carefully drawn, sets out membership by the petitioners in the fire department of the city of Boston, right by reason thereof to vote for twelve members of that department, who, together with the fire commissioner of that department, constitute the corporation established by St. 1909, c. 308, as amended by St. 1911, c. 134, and denial by the respondent of that right. The facts

found support every one of these allegations. Although the petitioners are not active members of the respondent corporation, their franchise to vote for twelve of such members is indubitably secured to them and to every other member of the fire department of the city of Boston by the express terms of the statutes heretofore cited. The petitioners were excused from making an express demand upon the respondent because the circumstances show that it would have been manifestly futile. No justification whatever is shown for refusal by the respondent to afford to the petitioners every facility for voting provided for other members of the department. This is an appropriate case for the issuance of the writ of mandamus. It is too clear for discussion that the case in this aspect is covered in every particular by the decision in *Fickett* v. *Boston Firemen's Relief Fund*, 220 Mass. 319. It has been found that the petitioners have not been refused by the respondent any pecuniary relief to which they were entitled; hence they show no present right to aid of the court in that respect.

Writ to issue.

WILLIAM K. PORTER *vs.* FANNIE E. P. PORTER & another.

Berkshire. September 23, 1920. — November 22, 1920.

Present: BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Equity Pleading and Practice, Exceptions, Finding by judge. *Mortgage*, Of real estate: foreclosure by sale. *Fraud. Evidence*, Inference, Presumptions and burden of proof, Letter.

Upon exceptions to rulings of a judge who heard a suit in equity upon the pleadings and a report of a master without a report of the evidence, findings of fact cannot be reviewed.

A master, to whom was referred a suit in equity by one of three sons of a woman who had died intestate seised of certain real estate, against the wife of the plaintiff's father by a second marriage and a bank to which his mother had mortgaged the real estate to secure the payment of a note of $3,500, to have a sale and conveyance of the property to the second wife of the father in foreclosure under a power of sale in the mortgage set aside as having been procured by fraud, found that previous to the sale the father had held the property as a tenant for life; that the mortgagee had complied literally with the requirements of the mortgage as to publication and notice; that on April 14, 1911, the treasurer of the mortgagee had written a letter to one of the brothers of the plaintiff who lived in New Orleans in the State of Louisiana, which was replied to on May 12 by a letter seeking advice as to the desirableness of the brothers purchasing

the property at a foreclosure sale; that the treasurer had replied by a letter on May 25, giving details requested and stating a willingness of the bank to have the mortgage continue, "providing the interest was paid promptly, but we cannot and will not allow it to run along in the shape in which it has been running;" that the first publication of notice of the sale was on May 26, 1911; that on June 2 the treasurer of the mortgagee had telegraphed to the same brother stating that the sale would take place on June 17, and that on June 3 that brother had written to the plaintiff, who was in San Francisco in the State of California, stating the substance of the correspondence with the treasurer and the pendency of the sale and making suggestions as to the brothers purchasing the property at the foreclosure sale. The master also found that the mortgagee had mailed copies of the paper containing the published notice to the plaintiff. There was no evidence that any of the brothers had requested a postponement of the sale or had communicated with the mortgagee or its officers or attorney except as above described. Twenty persons attended the sale on June 17 and the property was sold for $3,900, which was less than its value. The plaintiff's father and his second wife, the purchaser, continued to occupy the property until 1917, when he died. Two months later, this suit was brought. *Held*, that

(1) It was a reasonable inference that the letters conveying to the plaintiff notice of the impending sale were received by him;

(2) The findings of the master and reasonable inferences to be drawn therefrom did not warrant a finding of collusion and lack of good faith on the part of the defendants;

(3) The mere fact, that the property brought less than its value, did not invalidate the sale.

BILL IN EQUITY, filed in the Superior Court on April 11, 1917, and afterwards amended, by William K. Porter, one of the three sons of Flora M. Porter, late of North Adams, who were entitled as remaindermen after a life estate in their father, Arthur C. Porter, to real estate in North Adams of which their mother had died seised, against Fannie E. P. Porter, the wife of the plaintiff's father by a second marriage, and the North Adams Savings Bank, seeking to set aside a sale and conveyance of the real estate to the defendant Fannie E. P. Porter in foreclosure of a power of sale mortgage placed upon the property by the plaintiff's mother in her lifetime.

In the Superior Court, the suit was referred to a master. Material findings of the master are described in the opinion. After the filing of the master's report the suit was heard by *N. P. Brown*, J., upon a motion by the defendants for a recommittal of the report to the master and a motion by the plaintiff that the report be confirmed, and, the motion to recommit the report being denied and the report confirmed, it was further heard upon the pleadings and the master's report. Findings and rulings of the judge and

the order for a decree are described in the opinion. The defendants alleged exceptions.

The case was submitted on briefs at the sitting of the court in September, 1920, and afterwards was submitted on briefs to all the Justices except the Chief Justice.

M. E. Couch, for the defendants.

F. H. Cande & F. M. Myers, for the plaintiff.

CROSBY, J. This is a suit in equity, brought to set aside a sale of real estate made under the power contained in a mortgage. Flora M. Porter, owner of the real estate in question, on June 11, 1889, executed a mortgage thereon to the North Adams Savings Bank to secure the payment of a demand note for $3,500. She died intestate on March 8, 1893, leaving a husband, Arthur C. Porter, and three sons, William K. Porter (the plaintiff), John L. Porter, and Frederick A. Porter. Arthur C. Porter became tenant for life of the real estate covered by the mortgage, and the three sons became vested with the fee in the estate in remainder subject to the life estate. Arthur C. Porter married the defendant Fannie E. P. Porter, on April 18, 1894. On June 17, 1911, there being a default in the performance of the condition of the mortgage, the mortgagee, under the power of sale, having duly advertised the real estate for sale, sold it to the defendant Fannie E. P. Porter, who was the highest bidder at the foreclosure sale; and the savings bank caused a deed of the property to be executed to the purchaser, which deed was duly recorded.

The case was referred to a master who filed a report, and thereafter it was heard by a judge of the Superior Court upon the pleadings and the master's report. He filed a "Memorandum of Findings" wherein he recites that he finds the foreclosure and sale by the bank "was collusive as between its agents and attorneys and Arthur C. Porter and his attorneys and . . . [was] not conducted in good faith as between said bank and the plaintiffs and with reasonable regard for the interests of the plaintiffs." He also included in the "Memorandum of Findings" certain rulings of law, among them one that the plaintiff was not guilty of laches, and ordered a decree to be entered, in accordance with the third paragraph of the bill, that the conveyance from the bank to Fannie E. P. Porter and all conveyances described in subsequent paragraphs of the bill be null and void as to the plaintiff. The

case is before us on the exceptions of the defendants to the findings and rulings so made.

The right of a party to allege exceptions in any civil case in law or equity is given by R. L. c. 173, § 106, as amended by St. 1906, c. 342, § 3, and St. 1911, c. 212, and provides that "Exceptions may be alleged by any party who is aggrieved by an opinion, ruling, direction or judgment." A finding of fact is in no proper sense an "opinion, ruling, direction or judgment." Accordingly there can be no consideration of the correctness of findings of fact in equity on exceptions; such findings can be reviewed only by appeal, provided the evidence is reported. *McCusker* v. *Geiger*, 195 Mass. 46, 52. *Kennedy* v. *Welch*, 196 Mass. 592, 594. *Eaton* v. *Eaton*, 233 Mass. 351, 369.

A bill of exceptions presents for decision only questions of law.

The principal question for our decision is: Was the order for a decree setting aside the foreclosure sale and the deed given by the bank to Fannie E. P. Porter, warranted as matter of law?

The alleged wrongful acts of the defendants are set forth in the sixteenth paragraph of the bill which alleges that the bank did not comply with the conditions of the power of sale in the mortgage in making the sale; that the sale was irregular and void; that the bank and Fannie E. P. Porter and her husband, Arthur C. Porter, "colluded together to cause a foreclosure sale to be carried out in form without complying with the requirements contained in the power of sale in said mortgage in order that the estate of your complainant and the said John L. Porter and Frederick A. Porter in the said premises might be destroyed;" that all of the acts of the defendants and Arthur C. Porter hereinbefore set forth "were caused and attempted to be done with the intent and purpose aforesaid; that your complainant was in California at the time of said purported foreclosure sale and had no knowledge of the attempted proceedings or any opportunity to appear at said sale to protect his interests." It is to be observed that the bill does not allege in what respect the acts of the defendants were in fraud of the rights of the plaintiff, nor in what manner the foreclosure was invalid.

The master found that the mortgage was executed by Flora M. Porter and her husband to the bank for $3,500 on June 11, 1889, that the property was occupied by Mrs. Porter and her husband

until her death in 1893, and that he occupied the premises until his death on January 11, 1917; that he married the defendant Fannie E. P. Porter, in 1894, and she has lived on the premises from that date until the present time. He further found that before May 26, 1911 (the date of the first publication of the notice of foreclosure), there was a default in the conditions of the mortgage, which default continued until June 17, 1911, when the mortgage was foreclosed; that notice of the foreclosure sale was published on May 26, June 2, and June 9, 1911, and that on June 17, 1911, the property was sold, and was bid in for the defendant Fannie E. P. Porter. The affidavit of notice of sale made by the treasurer of the bank, which is made a part of the report, shows that the mortgagee's notice of sale was published upon the dates named in the North Adams Herald, a newspaper published in North Adams, where the real estate is located. The master found that "the facts relating to the foreclosure as recited in the affidavit in the deed under power in power of sale mortgage are established by the evidence in this case," and that the "amount of principal and interest and charges applicable to this mortgage at the time of sale was $3,900.65. The amount of $3,900 was paid by said Fannie E. P. Porter by the execution by her of a mortgage note secured by mortgage in the amount of $3,900 dated June 17, A. D. 1911. At said sale there were about twenty persons present. So far as it appears the North Adams Savings Bank made no effort to secure bidders to attend the foreclosure sale other than by the publication of the foreclosure notice on May 26th, June 2d and June 9th, A. D. 1911."

It also appears from the report that on February 1, 1912, Fannie E. P. Porter and her husband executed a note and mortgage to the North Adams Savings Bank for $2,970 upon the real estate covered by the mortgage in question and other lands owned by the grantors; that the indebtedness so secured existed before the foreclosure of the mortgage on June 17, 1911, and that Fannie E. P. Porter "had signed this note as an accommodation." On December 21, 1915, Fannie E. P. Porter deeded the property described in the mortgage which was foreclosed to Ezra D. Whitaker, subject to the mortgage, and thereafter Whitaker conveyed the property to Arthur C. and Fannie E. P. Porter, subject to the mortgage to the bank, "which the grantees by accepting

this deed assume and agree to pay." Both of the deeds last described were recorded on February 10, 1916.

The report recites that "Williston C. Bacon employed by said North Adams Savings Bank, testified that to the best of his recollection he sent marked copies of the newspaper containing the notices of foreclosure on May 27th, A. D. 1911, to John L. Porter, Frederick A. Porter and William K. Porter." The master found that the bank had the addresses of John L. Porter and William K. Porter, and that at the time of the foreclosure, the former lived in New Orleans, and the latter in San Francisco; that Ezra D. Whitaker, the treasurer of the bank, testified that he thought Frederick A. Porter lived in North Adams at the time of the foreclosure; that Bacon testified "that he did not remember where said Frederick A. Porter was living but that he sent him a paper." The master states that he is unable to make a finding as to the residence of Frederick A. Porter at that time.

The report shows that John L. Porter, one of the remaindermen, wrote to Whitaker, assistant treasurer of the savings bank, a letter dated New Orleans, Louisiana, May 12, 1911, (which evidently is in reply to a letter received on April 14,) requesting the opinion of Whitaker and his advice as to the desirableness of the writer and his brothers purchasing the property at a foreclosure sale, and asking what sum the bank would be willing to loan on it in that event; the letter also contains the following: "You expressed the opinion that the property would probably not realize much more than the bank claims which I understand are $3,500 together with the outstanding interest." Under date of May 25, 1911, Whitaker replied, in part, as follows: "the mortgage is $3,500 and . . . on June 11th next, there will be $315 back interest, that is interest for eighteen months. . . . We have left the bank's end of this matter in the hands of Judge C. T. Phelps of this city, and I would suggest that you write to him. Your father's attorney is Mr. P. J. Ashe and I understand that the attorneys have gotten together and arranged that the bank should foreclose the mortgage. This will leave the property open for either your father or yourself and your brothers to bid it in. The foreclosure sale will take about a month so that you will have plenty of time to make arrangements if you wish to bid the property in. In case the attorneys decide to foreclose I will see that a

notice of the sale is sent to yourself and your two brothers so that you may be fully informed as to the date of the sale and the terms, etc. In regard to your questions as to what the bank would do, I will say that very probably they will be perfectly willing to continue the mortgage of $3,500 providing the interest was paid promptly, but we cannot and will not allow it to run along in the shape in which it has been running."

On June 2, 1911, the treasurer of the bank sent a telegram to John L. Porter to the effect that the real estate would be sold under foreclosure proceedings on June 17, 1911. On June 3, 1911, John L. Porter wrote to his brother William K. Porter (the plaintiff) reciting the substance of the letter he had received from Whitaker, and also informing him of the telegram from Whitaker stating that the property "was to be sold on foreclosure proceedings on the 17th." The letter so sent to the plaintiff contained suggestions as to the advisability of the three brothers making some arrangement respecting buying the property. There is nothing to show that the plaintiff or either of his brothers requested a postponement of the sale or afterwards communicated with the bank or with any of its officers or attorneys.

It has been uniformly held by this court that the mortgagee, in the exercise of a power to foreclose a mortgage for breach of condition, must not only comply with its literal terms, but is required to use reasonable diligence to protect the rights of those who have an interest in the estate. In the case at bar, it appears that notice of the sale was duly published in a newspaper in North Adams where the property is situated, and that the sale was conducted in all respects with a literal compliance with the terms of the mortgage; it also appears that notice of the sale was given to the plaintiff and his brothers by mailing to them copies of the newspapers containing the notice; at least, the witness Bacon testified that to the best of his recollection he so mailed the copies and there was no evidence offered to show that they were not received, nor does the master so find. In addition, the contents of the letter written by the treasurer of the bank to John L. Porter was communicated to the plaintiff, and if received by the latter, he had ample time to protect his rights at the sale if he had desired to do so. In the absence of any evidence to the contrary, and without a finding of the master that these letters were not received

by the persons to whom they were directed, it is a reasonable inference that they were duly received. We find nothing in the letter written by the treasurer of the bank to indicate that the plaintiff or his brothers could have been deceived or misled. In addition, the finding that the treasurer of the bank, on June 2, 1911, sent a telegram to John L. Porter stating that the property would be sold under foreclosure proceedings on June 17, and that the recipient of this telegram on the day following its receipt informed the plaintiff by letter of its contents, plainly show that the bank exercised reasonable diligence to protect the rights of the remaindermen.

Although there was evidence that the property brought less than its value, that fact does not render the sale invalid. *Learned* v. *Geer*, 139 Mass. 31. *Austin* v. *Hatch*, 159 Mass. 198. *New England Mutual Life Ins. Co.* v. *Wing*, 191 Mass. 192. *Taylor* v. *Weingartner*, 223 Mass. 243.

The finding that about twenty persons attended the sale is evidence that it was not conducted in secrecy nor for the purpose of disposing of the property for less than its real value.

In view of the facts found by the master and the reasonable inferences to be drawn therefrom, we are unable to find any evidence of fraud or collusion on the part of the bank, the life tenant, Fannie E. P. Porter, or of the attorneys of the parties. The plaintiff had ample notice of the sale and full opportunity, either personally or by agent, to protect his own interests. While it was the duty of the life tenant to pay the interest on the mortgage, *Plympton* v. *Boston Dispensary*, 106 Mass. 544, 547, he failed to do so, and after it had become in arrears for eighteen months, it was the right, if not the duty of the bank, to protect its interests by the institution of foreclosure proceedings. The defendant Fannie E. P. Porter, although she was the wife of the life tenant, was not precluded from bidding off the property at the sale provided she acted in good faith.

In view of the conclusion reached, we need not determine whether it could have been ruled that the plaintiff's right to maintain the bill is not barred by laches.

We are of opinion that as matter of law the findings of the master and the reasonable inferences to be drawn therefrom do not warrant a finding of collusion and lack of good faith, as alleged

in the bill. Accordingly there was no evidence to justify a decree for the plaintiff. The exceptions must be sustained and the bill dismissed. St. 1913, c. 716.

So ordered.

IRA J. CASS *vs.* WILLIAM G. LORD & another.
SAME *vs.* AMERICAN CENTRAL INSURANCE COMPANY.

Worcester. September 27, 1920. — November 22, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, What constitutes, Of insurance. *Agency*, Liability of agent in contract. *Insurance*, Fire, Agent's liability.

An automobile dealer cannot maintain an action of contract against an insurance agent for breach of an oral agreement to procure and deliver to the plaintiff a valid policy of insurance against fire upon automobiles from time to time owned by the plaintiff in his business, or to insure such automobiles as the plaintiff might from time to time own and have on hand in connection with his business as an "automobile dealer," or to procure and deliver to the plaintiff a valid policy of insurance upon automobiles from time to time owned by the plaintiff in his business and, pending the issuance of such a policy, himself "to insure such automobiles," where, on the plaintiff's own uncontradicted and uncontrolled statements and admissions, it appears that he knew that the defendant was a general agent and dealt with him as such, and that he did not expect the agent to insure the cars himself but relied on such contract as the agent was to get for him from the insurance company, and it also appears that the agent procured from an insurance company and delivered to the plaintiff and the plaintiff accepted a policy binding the parties according to its terms.

Where an agent acts within the scope of his authority for a disclosed principal, he does not bind himself unless it appears that he expressly agreed to become personally responsible.

An automobile dealer is bound by the provisions of a policy of insurance against loss by fire of his automobile although he neither read the policy nor an accompanying rider nor knew "a single condition in" it, if he voluntarily accepted it and kept it in his safe until a loss by fire occurred.

In a policy of insurance against loss by fire issued to an automobile dealer and providing that it should "attach and cover upon automobiles, bodies, chassis, tops or other equipment while attached to and a part of automobiles owned by the assured and held by him for sale, from time of delivery to the assured, and to continue until said property is delivered to the purchaser or until same otherwise passes out of the possession of the assured . . . this period in no event to exceed twelve months or to extend beyond the termination" of the policy, the words, "automobiles owned by the assured and held by him for sale" are not ambiguous; and, at the trial of an action upon the policy, evidence of nego-

tiations and conversations preceding the issuing of the policy or following its issuance and before a fire within its terms, which tend to modify or vary its terms, is not admissible.

The policy above described also contained a provision that "no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached;" and it was *held*, that the effect of a provision of the policy could not be overcome by invoking the aid of the doctrine of waiver and estoppel based on interviews of the assured with agents of the insurance company after he had received and had accepted the policy.

The rider attached to and made a part of the policy above described contained a provision that "All risks attaching hereunder are to be reported to this Company as soon as known to the assured but no risk to be binding unless so reported and accepted, and for which a certificate is issued, signed by a duly authorized agent of the Company. This certificate is hereby made a part of this Policy." A further provision of the rider was that "It is understood and agreed that intentional failure to so report any such risk as soon as known to the assured shall render this entire contract null and void." At the trial of an action upon the policy for the loss of nineteen automobiles of the plaintiff damaged by fire, it appeared that, as to thirteen of the automobiles, the plaintiff had not reported to the company acquisition of ownership and possession "as soon as known" to him, and that such failure had not arisen from unavoidable mistake or excusable inadvertence on his part. *Held*, that under the provisions of the policy the plaintiff could not maintain the action.

TWO ACTIONS OF CONTRACT brought by a dealer in automobiles for the loss by fire of nineteen automobiles, the first action being against a firm of insurance brokers, and the second action being against an insurance company upon a policy of insurance. Writs dated August 14, 1917.

In the Superior Court the actions were tried together before *N. P. Brown*, J. The material evidence is described in the opinion. At the close of the evidence, at the request of the defendants, the judge in each case ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. F. Knight, for the plaintiff.

J. A. Stiles, for the defendants Lord.

W. L. Came, for the defendant insurance company.

BRALEY, J. The question in the first case is whether there was any evidence which entitles the plaintiff to go to the jury. It is alleged in substance that the defendants verbally agreed to procure and deliver a valid policy of insurance against fire upon automobiles from time to time owned by the plaintiff in his busi-

ness, or to insure such automobiles as the plaintiff might from time to time own and have on hand in connection with his business as an "automobile dealer," or to procure and deliver to the plaintiff a valid policy of insurance upon automobiles from time to time owned by the plaintiff in his business, and in the meantime "to insure such automobiles themselves." A valid oral contract for fire insurance binding the company before the issuance of a policy undoubtedly can be entered into as pointed out in the recent cases of *McQuaid* v. *Aetna Ins. Co.* 226 Mass. 281, and *Mowles* v. *Boston Ins. Co.* 226 Mass. 426, and an insurance agent can bind himself by parol to procure insurance, and if there is a breach of the contract he is liable in damages. *Sargent* v. *National Fire Ins. Co.* 86 N. Y. 626. *Everett* v. *O'Leary*, 90 Minn. 154. But to be valid and enforceable the contract must be mutually binding and supported by a consideration. The defendants having procured and delivered a policy binding the parties according to its terms, the plaintiff is forced to take the position, that, independently of their principal, the defendants also agreed to become personally liable as indemnitors, and, acting solely for themselves, to insure his property. *Hewins* v. *London Assurance Corp.* 184 Mass. 177, 182, 183. *Stone* v. *Old Colony Street Railway*, 212 Mass. 459, 464, 465. His own uncontradicted and uncontrolled statements and admissions of his contractual relations with the defendants and on which he must rely are, "I knew that they were general insurance agents and dealt with them as such. . . . I did not expect they were going to insure my car themselves. . . . I relied on some contract they was to get for me from the insurance company." It also appears that all premiums were paid to them as general agents of the company. It is general law that where an agent, as in the case at bar, acts within the scope of his authority for a disclosed principal, he does not bind himself unless it appears that he expressly agreed to become personally responsible. *Simonds* v. *Heard*, 23 Pick. 120. *Goodenough* v. *Thayer*, 132 Mass. 152. *Davis* v. *Cress*, 214 Mass. 379. The plaintiff having failed to introduce evidence from which a finding would have been warranted that the defendants bound themselves individually, the judge correctly ruled that he could not recover.

The second question is whether the action on the policy can

be maintained. The contract consists of the policy and of the rider or "slip," "Dealer's Form — Automobile," dated November 24, 1915, and apparently attached to the policy on December 15, 1915, the time when it was dated, countersigned and presumably delivered. It is of no consequence that the plaintiff did not read the policy or the accompanying rider, or "know a single condition in" it, but accepted and kept it in his safe until the fire. He is bound by the contract into which he voluntarily entered. *Secoulsky* v. *Oceanic Steam Navigation Co.* 223 Mass. 465, 466. The fifteenth clause of the rider declares that the agreements and stipulations contained in this form cancel and replace anything to the contrary printed in the policy, and accordingly under clause five the policy is "to attach and cover upon automobiles, bodies, chassis, tops or other equipment while attached to and a part of automobiles owned by the assured and held by him for sale, from time of delivery to the assured, and to continue until said property is delivered to the purchaser or until same otherwise passes out of the possession of the assured, . . . this period in no event to exceed twelve months or to extend beyond the termination" of the policy.

The plaintiff contends that the words "automobiles owned by the assured and held by him for sale" are ambiguous and open to explanation, and that the understanding of the parties as to the character of the property actually covered or to be covered should have been passed upon by the jury. We perceive no ambiguity. The words are to receive their ordinary meaning; nor can the automobiles be classified thereunder as comprising "new cars, second hand cars, and junk cars," some of which it was mutually understood the plaintiff did not intend to insure. *Hatch* v. *United States Casualty Co.* 197 Mass. 101, 104. *Follins* v. *Dill*, 229 Mass. 321. The preliminary conversations between the plaintiff and the general agents before he ordered the policy, and conversations after it issued and before the fire, as well as conversations following the fire were also rightly excluded. The policy is a complete instrument. It cannot be varied or modified by prior negotiations as narrated by the plaintiff, *Odiorne* v. *New England Mutual Marine Ins. Co.* 101 Mass. 551, 553; *De Friest* v. *Bradley*, 192 Mass. 346, 352, or overcome by invoking the aid of the doctrines of waiver and estoppel based on his interviews at any time

with the company's agents after he received and accepted the policy. It is expressly stipulated that, "no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached." *Batchelder* v. *Queen Ins. Co.* 135 Mass. 449. *Harris* v. *North American Ins. Co.* 190 Mass. 361, 368. *Urbaniak* v. *Fireman's Ins. Co.* 227 Mass. 132, 134.

We now come to the terms of the contract as shown by the policy and the rider. The policy is a "running policy," under which upon the record the specific property to be insured is to be ascertained subsequent to December 15, 1915. *Hartshorn* v. *Shoe & Leather Dealers' Ins. Co.* 15 Gray, 240. And from that date to the time of the fire the plaintiff received and sold about one hundred and nine automobiles of which about fifty were reported for insurance during the years 1916 and 1917. By clause six of the rider, "All risks attaching hereunder are to be reported to this Company as soon as known to the assured but no risk to be binding unless so reported and accepted, and for which a certificate is issued, signed by a duly authorized agent of the Company. This certificate is hereby made a part of this Policy. . . ." The company never having prepared nor provided a form of certificate, the judge correctly held that the lists of automobiles the plaintiff gave to the general agents, who approved them, the jury might find were a form of certificate which had been recognized by the company as sufficient. The "risks" nevertheless "attaching hereunder" were automobiles "owned by the assured and held by him for sale" during the period between the time when he acquired title and the date when he made delivery to a purchaser, or ceased to have them in his possession. While the delay varied, ranging from fifteen days to seventeen weeks, the plaintiff admitted that of the nineteen automobiles damaged by the fire at least thirteen had not been reported "as soon as known" to him. The language of the rider previously quoted is to be read with the fifth clause. It embraces all automobiles whether kept in the plaintiff's storehouse or in his garage, and there being no evidence from which compliance with these precedent conditions could

have been found, there can be no recovery for damage to the thirteen or possibly fifteen automobiles. *Atwood* v. *Caledonian American Ins. Co.* 206 Mass. 96. It is unnecessary to decide whether the jury under suitable instructions could have found that either six or four of the nineteen had been duly reported, and certified. The plaintiff having offered no evidence that his failure to report the thirteen automobiles "as soon as known" arose from unavoidable mistake, or excusable inadvertence, and having acted voluntarily with full knowledge of the time when he acquired title to and possession of each automobile, is concluded by the unequivocal and further provision in clause six, that "It is understood and agreed that intentional failure to so report any such risk as soon as known to the assured shall render this entire contract null and void." *Ferguson* v. *Union Mutual Life Ins. Co.* 187 Mass. 8, 12, and cases cited. See *Kemp* v. *Hammond Hotels*, 226 Mass. 409, 416.

It follows that the exceptions in each case must be overruled, and it is

So ordered.

WORCESTER MORRIS PLAN COMPANY *vs.* JUDSON C. MADER.

Worcester. September 27, 1920. — November 22, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Mortgage, Of personal property: recording. *Sale*, Conditional.

In an action of replevin the following facts appeared: The owner of a motor truck delivered it under an agreement in writing to one who gave therefor several notes for instalments of the purchase price, payable at stated intervals, it being agreed that the title to the truck should remain in the vendor until all the notes were paid. At a time when all notes then due had been paid by the vendee but some of the notes were not due, the vendor borrowed from the plaintiff an amount equal to what still was due on the notes, gave therefor his note, payable in instalments, and delivered to the plaintiff the notes and the agreement of conditional sale, indorsing upon it over his signature the statement, "For value received I hereby assign to the . . . [plaintiff] . . . the within lease and claim and my interest in the property therein described." The assignment never was recorded. The vendee, after having paid several of his instalment notes to the plaintiff, died and thereafter the vendor, without the plaintiff's knowledge, gave a bill of sale of the truck to the defendant and delivered it to him. Default thereafter having been made in payments both of

the vendee's notes and of instalments due on the vendor's note to the plaintiff, the plaintiff demanded possession of the truck, and, possession being refused, brought the writ of replevin. *Held*, that

(1) Under the conditional bill of sale the general ownership of the truck remained in the vendor, who could sell or mortgage his interest therein;

(2) The assignment to the plaintiff by the vendor, being given as security for the payment of a debt, was subject to the provisions of St. 1915, c. 226, and, not having been recorded, was not valid against the defendant;

(3) Judgment must be entered for the defendant.

REPLEVIN of "one Republic Automobile Truck No. 3394 Model 'A.'" Writ dated April 21, 1919.

In the Superior Court the action was heard by *Lawton*, J., without a jury, upon a case stated. Material facts therein agreed upon are described in the opinion. At the request of the parties, the judge reported the case to this court for determination upon the case stated, judgment to be entered for the plaintiff for one dollar and costs if the plaintiff was entitled to recover, and, if he was not entitled to recover, judgment to be entered "for the defendant with costs and an order for the return of the truck."

St. 1915, c. 226, reads as follows: "Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded on the records of the city or town in which the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business or follows his trade or calling. If the mortgagor resides out of the Commonwealth and the property mortgaged is within the Commonwealth when the mortgage is made, the mortgage shall be recorded on the records of the city or town in which the property then is. If a record in two different places is required and the mortgage is recorded in one within said fifteen days, it may be recorded in the other within ten days after the date of the first record. The mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited shall be void. The provisions of this section shall apply to bills of sale given for security. If the condition for redemption of the property included in such bill of sale is in writing, it shall be recorded with and as a part of the bill of sale; if the condition for redemption is oral, a written statement of such condition signed by the mortgagee shall be so recorded."

C. M. Thayer, F. C. Smith, Jr. & G. A. Gaskill, for the plaintiff, submitted a brief.

R. B. Dodge, for the defendant.

CROSBY, J. This is an action of replevin brought to recover an auto truck, and is before us on a report of a judge of the Superior Court upon a case stated.

The material facts are that on March 6, 1918, one Wise, the owner of the truck, delivered it to one Travers under an agreement in writing, by which the title remained in Wise until all the notes given by Travers for the purchase price under the agreement were fully paid. On August 30, 1918, all notes then due having been paid, and there remaining a balance of $1,425, Wise gave to the plaintiff a promissory note for that amount, payable by instalments, and at the same time assigned to the plaintiff as collateral security therefor all the Travers notes then remaining unpaid, together with the conditional sale agreement. The indorsement on the back of the agreement was as follows: "For value received I hereby assign to the Worcester Morris Plan Company the within lease and claim and my interest in the property therein described. Charles W. Wise." The assignment was not recorded.

From August 30, 1918, to and including January 6, 1919, all the Travers notes maturing during that period were paid by him to the plaintiff at maturity and were applied toward the payment of instalments due upon Wise's note of $1,425 to the plaintiff, and the balances of instalments due to the plaintiff on Wise's note were paid by Wise. The payments due on the Travers notes and on the Wise note on February 6, March 6, April 6, and May 6, 1919, had not been paid at the date of the plaintiff's writ and have not since been paid. Travers died in January, 1919; and afterwards Wise, without the knowledge of the plaintiff, gave a bill of sale of the truck to the defendant and delivered it to him. Default having been made in the notes held by the plaintiff, demand was made for payment, and as payment was not made, the plaintiff demanded possession of the truck, which was refused. The only question is, whether the assignment from Wise to the plaintiff should have been recorded in accordance with the provisions of R. L. c. 198, § 1, as amended by St. 1915, c. 226.

It has long been settled in this Commonwealth that a sale and

delivery of chattels on condition that the property is not to vest until the purchase price is paid does not pass title to the vendee. *Coggill* v. *Hartford & New Haven Railroad*, 3 Gray, 545. *Sargent* v. *Metcalf*, 5 Gray, 306. *Blanchard* v. *Child*, 7 Gray, 155. *Deshon* v. *Bigelow*, 8 Gray, 159. *Nichols* v. *Ashton*, 155 Mass. 205.

The conditional sale to Travers vested in him a special property in the truck which he could sell or mortgage. *Hurnanen* v. *Nicksa*, 228 Mass. 346, 350. Yet the general ownership and title remained in Wise, and was subject to be defeated only by the performance by Travers of his agreement. After the conditional sale to Travers, Wise continued to be the general owner of the truck and could sell or mortgage his interest therein. *Appleton* v. *Bancroft*, 10 Met. 231.

The assignment from Wise to the plaintiff transferred all his "interest in the property" described in the agreement of conditional sale: it transferred the legal title to the truck, subject to the right of redemption by Travers. It was in effect a bill of sale, and as it was given as security for the payment of a debt it constituted a mortgage. *Taber* v. *Hamlin*, 97 Mass. 489. It is a bill of sale as those words are used in St. 1915, c. 226, and as it was not recorded as provided by the statute, it was not valid as against the defendant.

The case of *Marsh* v. *Woodbury*, 1 Met. 436, related to a conditional assignment of a chose in action, and is not applicable to a specific article of personal property which is susceptible of delivery, although delivery cannot be made because it is in the possession of a third person, under an agreement, lien or pledge.

In accordance with the terms of the report, judgment must be entered "for the defendant with costs and an order for the return of the truck."

So ordered.

MICHELINA INANGELO *vs.* ARTHUR R. PETTERSON.

Worcester. October 18, 1920. — November 22, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, In use of highway. *Evidence*, Hospital record. *Practice, Civil*, Exceptions.

At the trial of an action by a girl against the operator of a motor car for personal injuries received by the plaintiff when eleven years of age and caused by her being run into by the motor car at about noon on a public way twenty-five feet wide, which she was crossing, there was evidence that, before starting to cross the way, the plaintiff had looked in both directions and had waited for motor vehicles to pass and that she had reached the farther side of the way and had one foot upon the curbstone when she was struck by the motor car, which was travelling at the rate of thirty or thirty-five miles an hour. *Held*, that a finding was warranted that the plaintiff was in the exercise of due care.

At the trial above described, the plaintiff introduced in evidence a hospital record of treatment for her injury, except a statement therein reading as follows: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)." The defendant then offered the portion of the record omitted by the plaintiff and that portion was excluded. *Held*, that the exclusion was right, since the admission of the excluded portion of the record would have been in direct violation of St. 1905, c. 330, as amended by St. 1912, c. 442.

TORT for personal injuries alleged to have been caused on March 14, 1919, by a motor car operated by the defendant running into the plaintiff on Shrewsbury Street in Worcester. Writ dated April 18, 1919.

In the Superior Court the action was tried before *Sanderson*, J. The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered for him. The motion was denied. The jury found for the plaintiff in the sum of $500; and the defendant alleged exceptions.

The case was submitted on briefs.

H. S. Avery, for the defendant.

N. Fusaro, E. F. Simpson & G. F. Foley, for the plaintiff.

CROSBY, J. The plaintiff, a girl about eleven years of age, while crossing a street at a place where a walk had been constructed for pedestrians, was struck and injured by an automobile operated by the defendant. The accident occurred about noon. There was

evidence that the street was twenty-five feet wide; that the plaintiff looked in both directions and waited for automobiles to pass, and then started across; that she had reached the opposite side and had her right foot on the curbstone when she was struck by the automobile; that she did not see it until after she was struck; and that the automobile was travelling at the rate of thirty or thirty-five miles an hour at that time. It is conceded that there was evidence of the defendant's negligence. Upon the facts recited in the record it could have been found that the plaintiff was in the exercise of due care. *Beale* v. *Old Colony Street Railway*, 196 Mass. 119, 123. *Patrick* v. *Deziel*, 223 Mass. 505. *Prendergast* v. *Boston Elevated Railway*, 232 Mass. 409, 411.

The plaintiff offered in evidence a part of the hospital record respecting her case, which was admitted. The following part of the record was offered by the defendant and excluded subject to the defendant's exception: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)." The statute under which hospital records are admissible in evidence, St. 1905, c. 330, § 2, as amended by St. 1908, c. 269, and by St. 1912, c. 442, § 2, permits their introduction so far as they relate "to the treatment and medical history of such cases; but nothing therein contained shall be admissible as evidence which has reference to the question of liability." Clearly the purpose of the statute was to exclude any part of a record that referred to the question of liability; such evidence would be hearsay and contrary to a well established rule.

The defendant relies on the decision in the recent case of *Leonard* v. *Boston Elevated Railway*, 234 Mass. 480. It was there decided that in the trial of an action for personal injuries the recital in the record "Odor of alcohol on breath" could not be held as matter of law not to relate to the plaintiff's medical history, and may have been a material fact to consider in making a diagnosis of his condition.

In the case at bar the complete record is annexed to the bill of exceptions, from which it appears independently of the portion excluded that the plaintiff received an injury to her left leg; it is plain that so much of the record as was competent under the statute was admitted and the defendant was not harmed by the

exclusion. To have permitted the defendant to introduce that part which recited that the plaintiff was injured while she "was running along the road" would have been in direct violation of the statute.

The case of *Wilder* v. *General Motorcycle Sales Co.* 232 Mass. 305, cited by the defendant, is not an authority in favor of his contention; in that case no question respecting the admissibility of a hospital record was considered.

Exceptions overruled.

ARNETTA E. BETTS *vs.* GEORGE T. RENDLE.

Suffolk. October 22, 1920. — November 22, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Evidence, Expert: opinion, Presumptions and burden of proof. *Practice, Civil*, Argument of counsel, Exceptions, Requests, rulings and instructions. *Negligence, Res ipsa loquitur*. *Damages*, In recoupment.

In an action for services rendered and disbursements made in raising a sunken lighter of the defendant, the defendant claimed in recoupment damages due to the tearing of planks from the bottom of the lighter by reason of alleged negligence of the plaintiff. At the trial, the defendant was asked by his counsel, "What did the tearing off of those planks as they were torn off, in view of the condition of your boat, indicate about the skill or lack of skill of the operation?" The question was excluded. *Held*, that the question was improper and rightly was excluded.

An exception by the defendant at a trial to a statement by the plaintiff's counsel to the jury, "it is my honest opinion that this is a trumped up defence," will be overruled, although the statement was improper, where it appears that, at the conclusion of the charge, the matter being called to the judge's attention, he instructed the jury as follows: "I ought to have corrected that in this respect: counsel frequently do, but ought not to, say what their opinion is about anything; their opinion is of no consequence to the jury. . . . But if he [the plaintiff's counsel] said and argued that you should believe upon the evidence that this was a trumped up charge, I see nothing which is open to criticism as an argument . . . it is for the jury to say whether a statement in argument is warranted by the evidence or not. Counsel's opinion is of no consequence."

An action of contract for services rendered and disbursements made in raising a sunken lighter, wherein the defendant claimed in recoupment damages alleged to have resulted from negligence of the plaintiff, was tried solely on the question, whether the plaintiff's work was done properly or negligently, and there was no evidence of error of judgment on the plaintiff's part as distinguished

from negligence and no contention was made by the plaintiff that he had committed an error of judgment. Requests of the defendant, for rulings to the effect that an error of judgment on the plaintiff's part would not relieve him from liability for the damage caused to the defendant, were refused. *Held*, that the requests properly were refused.

An exception by the defendant to a refusal of the judge to rule, at the trial above described, in substance that the plaintiff was entitled to recover, for such services as he rendered, only "what would be a reasonable and customary charge for similar services at the time and place in question," must be overruled where it appears that the judge charged the jury in substance that it would be for them to determine what the plaintiff's services were reasonably worth; that the defendant was entitled to have deducted from the claim of the plaintiff the amount of any damage done to the lighter arising from negligence of the plaintiff, and that, if they should find that the defendant by reason of such negligence had suffered damage equal to or in excess of the amount of the plaintiff's "proper bill," then they would return a verdict for the defendant.

It was proper, at the trial above described, where the only evidence of negligence of the plaintiff related to the method adopted by him in putting wire cables, called "straps," under the lighter and in allowing her to strike the bottom of the harbor while being towed, for the judge to refuse a request by the defendant that he rule, "To make out a case of specific negligence on the part of the plaintiff it was not necessary for the defendant to put his hand on the specific act of the plaintiff that caused the damage to his lighter. It was enough for the defendant to prove that the damage must have been caused by one or more of several things."

A request by the defendant for a ruling, "If the defendant fails to prove specific negligence on the part of the plaintiff he has a right to fall back on the doctrine of *res ipsa loquitur*," properly was refused at the trial above described, that doctrine having no application to the facts in evidence.

CONTRACT for $850.05 upon an account annexed for services rendered and disbursements made in the raising of a lighter of the defendant sunk at a pier in Boston Harbor. Writ in the Municipal Court of the City of Boston dated March 7, 1919.

The defendant sought damages in recoupment.

On removal to the Superior Court, the action was tried before *Fox*, J. Material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings among others:

"C. On all the evidence, if the jury find that a substantial amount of the bottom planking of the defendant's lighter was torn off in the course of the plaintiff's work, and that the bottom of said lighter at the time was in reasonably sound and strong condition, they would be justified in concluding that the plaintiff did not perform his work in a reasonably careful and skillful manner."

"F. On all the evidence, if the jury find that a substantial

amount of the bottom planking of the defendant's lighter was torn off in the course of plaintiff's work, and that the bottom of said lighter was at the time in a reasonably sound and strong condition, they would not be justified in relieving the plaintiff from responsibility on the ground that the damage was caused by error of judgment.

"G. There is no evidence in this case upon which the jury would be warranted in relieving the plaintiff of responsibility on the ground of an error of judgment falling short of negligence or unskillfulness for damage caused to the defendant's lighter as result of the plaintiff's work.

"H. If the jury finds that the plaintiff is entitled to recover in respect of a part or the whole of the services rendered, he is only entitled to recover what would be a reasonable and customary charge for similar services at the time and place in question."

"J. To make out a case of specific negligence on the part of the plaintiff it was not necessary for the defendant to put his hand on the specific act of the plaintiff that caused the damage to his lighter. It was enough for the defendant to prove that the damage must have been caused by one or more of several things.

"K. If the defendant fails to prove specific negligence on the part of the plaintiff, he has a right to fall back on the doctrine of *res ipsa loquitur*."

The requests were refused.

The jury found for the plaintiff in the sum of $850.05; and the defendant alleged exceptions.

G. R. Farnum, for the defendant.

G. L. Dillaway, for the plaintiff.

CROSBY, J. This is an action of contract on an account annexed to recover for services rendered and disbursements incurred in raising a sunken lighter belonging to the defendant. At the time of the sinking in the Cunard docks in East Boston, the lighter was loaded with about two hundred and eighty tons of sand, her capacity being three hundred tons. The principal issue tried was whether the work was performed in a proper and workmanlike manner, it being the contention of the defendant that the method of putting wire cables, called straps, under the lighter for the purpose of raising her was done in an improper manner and resulted in some of the planking being torn off the bottom of the

lighter causing the damages which the defendant seeks to recoup from the plaintiff's claim. Upon this issue the evidence was conflicting and presented a question of fact for the jury.

The defendant contends that the presiding judge erred, (1) in excluding a question put the defendant, (2) because counsel for the plaintiff was allowed to make an improper argument to the jury, and (3) in refusing to give certain requests for rulings.

In direct examination the defendant was asked by his counsel, "What did the tearing off of those planks as they were torn off, in view of the condition of your boat, indicate about the skill or lack of skill of the operation?" This was excluded and the defendant excepted. The question, which was based on the facts as the witness found them and not on an hypothesis, called for an answer to the precise question which was the issue before the jury. Whether the planks came off because of the weight of sand in the boat or for some other reason, and before the plaintiff attempted to raise her, or were torn off by the plaintiff, was in dispute. The question allowed the witness to assume that the planks were torn off and then to give his opinion based upon the condition of the boat as he found it; it was rightly excluded. *Stoddard* v. *Winchester*, 157 Mass. 567, 575. *Chalmers* v. *Whitmore Manuf. Co.* 164 Mass. 532.

The plaintiff's counsel in his closing argument to the jury said: "it is my honest opinion that this is a trumped up defence;" at that time the defendant's counsel objected to the statement, the court ruled that it was not objectionable and the defendant excepted. The argument was clearly improper and the jury should then have been told to disregard it. The record shows that, at the conclusion of the charge, the judge's attention was again called to that part of the argument of counsel, and he then said to the jury, "I ought to have corrected that in this respect; counsel frequently do, but ought not to, say what their opinion is about anything; their opinion is of no consequence to the jury. . . . But if he said and argued that you should believe upon the evidence that this was a trumped up charge, I see nothing which is open to criticism as an argument . . . it is for the jury to say whether a statement in argument is warranted by the evidence or not. Counsel's opinion is of no consequence." We think these instruc-

tions given at the conclusion of the charge corrected the erroneous ruling previously made; although the jury were not expressly told to disregard the objectionable argument, such was the plain effect of the instructions. We are of opinion the jury must have understood that the statement made by counsel should be disregarded. *Morrison* v. *Richardson*, 194 Mass. 370, 377, 378. *Commonwealth* v. *Richmond*, 207 Mass. 240, 250. *Mikkelson* v. *Connolly*, 229 Mass. 360.

It remains to consider the defendant's requests for rulings.

Request "C" was covered by the instructions given.

The exceptions to the refusals to give requests "F" and "G" must be overruled. While the judge stated that the method of doing the work might have been due to an error of judgment "which does not imply any lack of reasonable skill or reasonable care," it plainly appears that the case was tried wholly on the issue whether the work was properly or negligently performed; there was no evidence of error of judgment as distinguished from negligence, and no contention was made by the plaintiff that he committed any error of judgment, his sole contention in this connection being that the work was performed without negligence.

Request "H" could not have been given. The jury were instructed in substance that it would be for them to determine what the plaintiff's services were reasonably worth; and also, that the defendant was entitled to have deducted from the claim of the plaintiff the amount of any damage done to the lighter arising from negligence of the plaintiff, and that, if they should find that the defendant by reason of such negligence had suffered damage equal to or in excess of the amount of the plaintiff's "proper bill," then they would return a verdict for the defendant. We think that the instructions given covered this request. It might be assumed in the absence of evidence to the contrary that the charges were to be governed by charges for similar services at the time and place in question. The instruction that the burden of proof was on the defendant in a case of recoupment was correct. *Sayles* v. *Quinn*, 196 Mass. 492.

Request "J" could not have been given. The only evidence of the plaintiff's negligence was that relating to the method adopted in putting the straps under the lighter, and allowing her to strike the bottom of the harbor while being towed to the flats; accord-

ingly it could not have been inferred that there was any other negligence on his part.

Request "K" was rightly refused. This is not a case where the doctrine of *res ipsa loquitur* can be held to apply. The jury would not have been warranted in inferring in the absence of any explanation, that according to common experience planks would not be detached from the bottom of the boat except for the plaintiff's fault. *Curtin* v. *Boston Elevated Railway*, 194 Mass. 260, 264. *Kusick* v. *Thorndike & Hicks, Inc.* 224 Mass. 413.

We have examined the remaining exceptions and are of opinion that no reversible error is shown. So far as they were founded on correct principles of law and were applicable, they were covered by the charge, which is reported in full.

Exceptions overruled.

SIMON G. ROBINSON *vs.* HARRY FREEMAN.

Bristol. October 25, 1920. — November 22, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Judgment, Foreign. *Jurisdiction. Evidence*, Presumptions and burden of proof.

There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction.

Where, at the trial of an action upon a judgment of a court of the State of New York of general jurisdiction, the plaintiff introduces in evidence under R. L. c. 175, § 71, a properly attested and duly authenticated record of the judgment, which included a return under oath of a person who made service on the defendant, and there is evidence that the plaintiff's father-in-law served upon and read to the defendant a paper prepared by the plaintiff's counsel summoning the defendant into court and there is no evidence that under the law of the State of New York such service was insufficient to give the court jurisdiction, the presumption in favor of the judgment of the New York court is not overcome as a matter of law and the recitals of the record of the judgment as to service upon the defendant were properly considered.

CONTRACT upon a judgment of a court of the State of New York. Writ in the Second District Court of Bristol dated October 22, 1918.

On appeal to the Superior Court, the action was tried before *Raymond*, J. Material evidence is described in the opinion. The jury found for the plaintiff in the sum of $518.84; and the defendant alleged exceptions.

The case was submitted on briefs.

D. R. Radovsky, for the defendant.

L. Shabshelowitz, for the plaintiff.

CROSBY, J. This is an action on a judgment rendered by a court in the State of New York against the defendant. Although the record of the judgment is not before us, the bill of exceptions recites that it was introduced in evidence and that it contained a return under oath by the party who made service on the defendant. No objection was made to the introduction of the record.

It is not controverted that the judgment was rendered in a court of general jurisdiction. There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction. *Rand* v. *Hanson*, 154 Mass. 87. *American Tube & Iron Co.* v. *Crafts*, 156 Mass. 257.

The defendant excepted "to the judge's charge to the effect that the fact that the papers show that service was made is to be considered as evidence that service was made."

While there is a presumption in favor of the jurisdiction arising from the action of the court, it is always a defence to an action on a judgment to show that the defendant was not a resident of the State in which the judgment was rendered and that no proper service was made on him there. *Rand* v. *Hanson, supra. Galpin* v. *Page*, 18 Wall. 350. The record in the case at bar shows there was evidence that the father-in-law of the plaintiff served upon the defendant a paper which was prepared by the plaintiff's New York counsel; "that the paper was read to the defendant which paper summoned the defendant into court." The defendant denied that such paper was served upon him. "There was no evidence offered by the defendant that the alleged service by the father-in-law was ineffective, improper or contrary to the laws of New York State." The statute law of the State of New York was not offered in evidence, and there is nothing to show whether a person other than a public officer is qualified to serve civil process. It was in evidence, however, that the record of the judgment contains the return under oath of the person who made

the service and that the defendant was summoned to appear. It is not denied that the record was duly attested and authenticated. R. L. c. 175, § 71.

The defendant, upon whom the burden of proof rested to show that service of civil process made by a person other than a public officer was invalid in the State of New York, offered no evidence to that effect. He therefore failed to prove that the court was without jurisdiction. The presumption in favor of jurisdiction arising from the action of the court accordingly has not been overcome, and the record of the judgment having been admitted without objection, its recitals were proper to be considered, and the judge so instructed the jury.

Exceptions overruled.

COMMONWEALTH *vs.* SAM SOOKEY.
SAME *vs.* MICHAEL J. REAGEN.

Berkshire. September 23, 1920. — November 23, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Intoxicating Liquor. Jamaica Ginger. Evidence, Presumptions and burden of proof, Judicial notice. *Practice, Criminal,* Agreed facts, Question for jury. *Jury and Jurors. Words,* "Beverage," "Intoxicating liquor."

The fact that Jamaica ginger contains eighty-eight per cent of alcohol does not make it "intoxicating liquor" within the definition of R. L. c. 100, § 2, unless it is shown to be a "beverage," that is, a liquor for drinking.

At the trial of a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger," the facts were agreed upon and were merely that the defendant conducted a store in which he sold ice cream, soda water, cigars, tobacco and toilet articles and also maintained in the rear of his store four billiard and pool tables for the use of the public, that, from a stock of twenty-four bottles of Jamaica ginger which he had purchased from a wholesale grocer, he sold one bottle at retail, that the bottle was an original package and bore a label stating it to be, "Alcohol 88%" "For flavoring and medicinal purposes," and that it contained alcohol as stated on the label. By order of the judge, the jury found the defendant guilty. *Held,* that

(1) There was no evidence that the article sold was fit for beverage purposes, nor that it ordinarily was so used;

(2) The court could not take judicial notice that extract of Jamaica ginger,

of an alcoholic content of eighty-eight per cent, is in fact an intoxicating beverage, and that it is generally sold and used as such;

(3) A verdict of guilty was not warranted;

(4) Even if the facts agreed upon had warranted a finding that the Jamaica ginger sold was an intoxicating beverage, that issue, being one of fact, should have been submitted to the jury.

Two COMPLAINTS, received and sworn to in the District Court of Central Berkshire on July 17, 1919, each complaint charging that the defendant therein on that day "did unlawfully sell intoxicating liquor, to-wit, Jamaica Ginger," to Frederick Harrington.

On appeal to the Superior Court the cases were tried together before *N. P. Brown*, J., upon a statement of facts agreed upon by the counsel for the defendants and the district attorney. These facts are described in the opinion. The defendants moved that a verdict of "not guilty" be ordered. The motions were denied, and the jury were ordered to return a verdict of guilty in each case. The cases then were reported to the Supreme Judicial Court by the trial judge "upon the request of the district attorney and with the consent of the defendants, for the purpose of determining whether or not there was error of law in denying the defendants' motions, upon the evidence submitted in the agreed statement of facts, and in directing the jury to return a verdict of guilty upon each complaint, and, upon consideration thereof by the Supreme Judicial Court, for the purpose of making such order as law and justice may require."

The cases were submitted on briefs.

M. B. Warner & J. Barker, for the defendant Sookey.

H. R. Goewey, for the defendant Reagen.

C. H. Wright, District Attorney, for the Commonwealth.

DE COURCY, J. In each of these cases the complaint alleged an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger," to one Harrington, at Pittsfield, on July 17, 1919. The cases were tried together. The only evidence offered was an agreed statement of facts. It appears therein that the defendant Sookey conducts a retail grocery, in which he also sells soda water and ice cream. He had bought from the Berkshire Grocery Company, wholesale grocers, twelve dozen bottles of a standard brand of Jamaica ginger, containing alcohol as stated in the label on each bottle, which label read as follows:

"3 FL. OZ.
HARRIS'
Strictly Pure
EXTRACT
JAMAICA GINGER
Alcohol 88%
For flavoring and
Medicinal purposes
Manufactured by
Frank E. Harris Co.
Binghamton, N. Y."

On the day alleged Harrington "purchased a bottle from said defendant, being an original package of said Jamaica Ginger;" and the bottle was brought into court as evidence. The facts in the Reagen case are the same, except that he "conducted a store in which he sold ice cream, soda water, cigars, tobacco, toilet articles, and also maintained in the rear of his store four billiard and pool tables for the use of the public." He had on hand about twenty-four bottles of Jamaica ginger.

The motion of each defendant for a directed verdict raises the question whether a verdict of guilty was warranted by the agreed facts. We put aside the discussion of art. 18 of the Amendments to the Federal Constitution, and the Volstead act, 41 U. S. Sts. at Large, 305, enacted by Congress to enforce the same, as they were not in effect at the time of the sales in question. Nor is it contended that the earlier war-time prohibition act has any application. See *Jacob Ruppert* v. *Caffey*, 251 U. S. 264. The statute that the defendants were charged with violating is R. L. c. 100, which prohibits the unauthorized sale of intoxicating liquor. It was held in the recent case of *Commonwealth* v. *Nickerson*, *ante*, 281, that this statute "has not been abrogated by the Eighteenth Amendment and the Volstead act. The sections under which the complaint was framed against the defendant are still operative and efficacious." Section 2 provides as follows: "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter." Jamaica

ginger is not included in this definition, unless it is shown to be a "beverage," that is to say, a liquor for drinking. The mere fact that it contains a large percentage of alcohol does not make it "intoxicating liquor" within the meaning of the statute. There are numerous medical preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia (see R. L. c. 75, § 18; c. 100, § 17, cl. 3), and many patent and proprietary medicines, toilet and antiseptic solutions, which contain much more than "one per cent of alcohol," but whose use as a beverage is rendered practically impossible by reason of other ingredients. *Commonwealth* v. *Mandeville*, 142 Mass. 469. *State* v. *Costa*, 78 Vt. 198, 207. *Intoxicating Liquor Cases*, 25 Kans. 751.

In this meagre record there appears no evidence that the article sold was fit for beverage purposes, much less that it was ordinarily so used. No testimony was introduced as to its nature, or as to its constituent elements other than the alcohol. So far as disclosed by the agreed facts, it was manufactured solely "for flavoring and medicinal purposes," as the label indicated, and sold by each of these defendants to Harrington in good faith for those purposes. It would be only conjecture to infer from a single sale of Jamaica ginger, without any evidence of the possibility or extent of the use of this preparation as a beverage, that the bottle was in fact sold not as a medicine, but as intoxicating liquor. *Commonwealth* v. *Ramsdell*, 130 Mass. 68. *Commonwealth* v. *Joslin*, 158 Mass. 482. It could not be ruled as matter of law that the mere possession by a grocer or druggist of certain well known articles ordinarily used for medical, culinary, toilet or antiseptic purposes, and containing alcohol, makes the dealer criminally liable for the illegal keeping of intoxicating liquor, under our statutes. See in this connection R. L. c. 76, § 23, as amended by St. 1910, c. 172. For the more stringent provisions of the Volstead act see Title II, §§ 1, 4, and Regulations 60, issued under said act by the Bureau of Internal Revenue; especially see Treasury Decisions, Internal Revenue, 3092, approved November 16, 1920, with reference to extract of ginger.

We cannot supply the lack of essential evidence in the present case by taking "judicial notice" that extract of Jamaica ginger is in fact an intoxicating beverage, and that it is generally sold and used as such. In this jurisdiction, where licenses for the sale

of intoxicating liquors have been granted under a local option system and there has been little occasion in many communities to resort to substitutes therefor, it has not become, as yet at least, a matter of common and general knowledge that ordinarily this well known preparation is sold not for medicinal purposes, but as a disguised substitute for liquor. In other words that alleged fact is not so notorious that we can assume without proof that Jamaica ginger has the distinctive character, use and effect of an intoxicating liquor. As was said in *State* v. *Barr*, 84 Vt. 38, 41, "In some States the courts now take judicial notice of the properties of persimmon beer, rice beer, and potato beer; while in this State there is no such common knowledge of these things as to warrant judicial notice of them." See *Commonwealth* v. *Pease*, 110 Mass. 412; Ann. Cas. 1914 C 874 note; 48 L. R. A. (N. S.) 302, 308, notes. 4 Wigmore on Evidence, § 2582.

Confining ourselves to the present record, we are of opinion that on the scanty facts appearing in the agreed statement the Commonwealth did not go far enough to warrant a verdict of guilty; and the motion of each defendant to that effect should not have been denied.

In view of the judge's direction of verdicts of guilty, it should be added, that even if the agreed facts had warranted a finding that this Jamaica ginger was an intoxicating beverage within the meaning of our statute, that issue, being one of fact, should have been submitted to the jury. *Commonwealth* v. *Hallett*, 103 Mass. 452. *Compton* v. *State*, 95 Ala. 25. *Cooper* v. *State*, 19 Ariz. 486. *State* v. *Miller*, 92 Kans. 994, 1004. *Bertrand* v. *State*, 73 Miss. 51. *Arbuthnot* v. *State*, 56 Tex. Cr. 517. In *Mitchell* v. *Commonwealth*, 106 Ky. 602, relied on by the Commonwealth, the issue was so submitted. And in *State* v. *Intoxicating Liquors & Vessels*, 106 Atl. Rep. 711, it was stated in the opinion, "the evidence shows that the Jamaica Ginger could be and was used by ordinary persons as a beverage, and in such quantities as to produce intoxication, and did in fact produce intoxication." Accordingly it was held to be intoxicating liquor, within the meaning of the Maine Rev. Sts. c. 127, §§ 21, 22.

It follows that in each case the verdict must be set aside; and it is

So ordered.

AUBREY Z. GOODFELLOW, administrator, *vs.* LAMBERT H. FARNHAM & another.

Worcester. September 26, 1920. — November 23, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Bills and Notes, What constitutes. *Pleading, Civil*, Declaration.

The following instrument is a negotiable promissory note: "On demand after date I promise to pay to the order of Ann Maria Sprague One thousand Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society."

The following instrument is a negotiable promissory note: "On demand after date I promise to pay to the order of Ann Maria Sprague Four hundred Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society."

A declaration in an action by the administrator of the estate of the payee named in the foregoing instruments against the makers need not set forth any consideration for the promises therein contained.

CONTRACT, with a declaration in two counts, each upon an instrument alleged to be "a promissory note, payable to the plaintiff's intestate or order," the instruments being described in the opinion. Writ dated March 19, 1919.

The defendants demurred. The demurrers were heard by *Hammond*, J., and were sustained. Judgment was entered for the defendants; and the plaintiff appealed.

The case was submitted on briefs.

J. A. Stiles & A. Z. Goodfellow, for the plaintiff.

E. H. Hadley, for the defendants.

BRALEY, J. The material parts of the instruments declared on read as follows: "On demand after date I promise to pay to the order of Ann Maria Sprague One thousand Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her

decease, interest to go to said Baptist Society." "On demand after date I promise to pay to the order of Ann Maria Sprague Four hundred Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society."

The defendants' demurrer having been sustained and judgment ordered in their favor, the question for decision on the plaintiff's appeal is, whether the instruments are negotiable promissory notes. If they are, it is immaterial that no value is expressly stated. R. L. c. 73, § 23. The promise in each instrument to pay to the order of the payee is absolute and she could by indorsement in her lifetime have transferred title, and the indorsee could have demanded and enforced payment. The words following do not create any contingency postponing payment, or impose any limitation on or modification of the defendants' promise to pay to her absolutely and at all events. It is plain that this is the only express contract between the intestate and the makers, and being unconditional the defence of non-negotiability cannot prevail. R. L. c. 73, § 18. *Cherry* v. *Sprague*, 187 Mass. 113. *National Bank of Newbury* v. *Wentworth*, 218 Mass. 30, 32. The judgment accordingly must be reversed and the demurrer overruled.

So ordered.

FRANCIS W. ADAMS *vs.* CHARLES HAYDEN & others.

Suffolk. October 18, 1920. — November 23, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Wagering Contracts. Stockbroker. Practice, Civil, Auditor's report. *Evidence,* Presumptions and burden of proof.

From findings of an auditor, to whom was referred an action under R. L. c. 99, § 4, for cash paid and securities delivered by the plaintiff to the defendant, a stockbroker, it appeared that the course of dealings between the parties throughout indicated genuine transactions and not mere wagers under the guise of contracts for the purchase and sale of securities, and on the entire evidence before him

the auditor found "that the plaintiff did not at any time intend that there should not be any actual purchases or sales by the defendants, of the stocks he ordered bought or sold; that in some cases he intended the stocks should be bought or sold by the defendants as ordered; and in other cases he had no intention as to whether the defendants should or should not make actual purchases or sales in carrying out his orders." In the report there also were findings "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold;" and "the plaintiff did not intend to demand or receive certificates of the stocks he ordered to be purchased, but to give orders later to sell the same amount of stocks, hoping to make a profit by selling at an increased price." The evidence before the auditor was not reported. A judge, who heard the action upon the auditor's report and a stipulation as to certain evidence which was before the auditor, found for the defendant. *Held*, that

(1) The finding, "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold" was, under § 6 of the statute, at most *prima facie* evidence of the apparent intent required by the statute, and did not as a matter of law require a finding of such intent if on all the evidence a contrary finding was warranted;

(2) In the circumstances and in the absence of a report of the entire evidence before the auditor, the auditor's conclusion of fact, that the plaintiff did not at any time intend that there should not be actual purchases or sales by the defendant, must stand because it was not as a matter of law inconsistent with other facts found by him;

(3) The statute did not make the defendant liable merely upon his carrying on margin securities which he had purchased for his customer;

(4) The trial judge was warranted in finding for the defendant.

CONTRACT for $60,426.06, upon an account annexed containing items of cash paid and of securities delivered to the defendants and of items called "equity on sale of" certain securities. Writ dated March 22, 1917.

The action was referred to an auditor, and, after the filing of the auditor's report, was heard by *Hitchcock*, J., without a jury, upon the auditor's report and a stipulation as to certain evidence before the auditor. The material findings of the auditor and facts agreed upon are described in the opinion.

The plaintiff moved that, upon all the evidence, a finding should be entered in his favor; and also requested the following rulings:

"1. If the court finds that there were numerous settlements in the account, within the meaning of R. L. c. 99, § 6, from substantially the opening of the account until its close, and constituting a very large proportion of the transactions, then upon all the evi-

dence in this case the plaintiff is entitled to recover as a matter of law.

"2. There is no evidence in the case as a matter of law to warrant a finding that the defendants made actual purchases and sales upon any of the plaintiff's orders where settlements were made.

"3. The execution of orders to buy or sell stocks on the stock exchange, is not of itself sufficient evidence of actual purchases and sales by the defendants."

"6. If the court finds that the plaintiff intended to enter into wagering transactions with the defendants, and that the defendants had reasonable cause to believe that such was his intent, it is not necessary for the plaintiff to prove further that he had a specific intent that the defendants should not make actual purchases and sales.

"7. There is no evidence in the case as a matter of law to warrant a finding that the defendants made actual purchases or sales upon any of the plaintiff's orders to sell stocks in cases where he had no such stocks in his account with the defendants at the time of giving the order to sell and did not at any time deliver certificates of those stocks to the defendants, but afterwards covered the selling order by a corresponding order to buy the same stocks.

"8. If the court finds that a large proportion of the plaintiff's transactions with the defendants were either settlements or orders to sell stocks which the plaintiff did not own at the time of giving the order, so far as was disclosed or known to the defendants, then the plaintiff's entire account was tainted with illegality.

"9. The plaintiff is entitled to recover as damages all payments made and the value of the securities delivered by him to the defendants.

"10. The defendants cannot reduce the amount of damages by any payments which they made to the plaintiff, if their payments to the plaintiff were not in fact on account of the principal sums paid in by him, but were on account of the unlawful transactions."

As to the sixth ruling requested, the judge stated, "Court does not so find;" he also denied the plaintiff's motion and requests for the rulings above described and found for the defendants; and the plaintiff alleged exceptions.

W. R. Bigelow, for the plaintiff.

C. F. Choate, Jr., (*H. W. Beal & J. H. Powers* with him,) for the defendants.

De Courcy, J. The plaintiff dealt with the defendants as his bankers and brokers. In this action he seeks to recover under the provisions of R. L. c. 99, § 4, claiming that, when he ordered the defendants to buy and sell stocks on his account, he intended that there should be no actual purchases or sales, and that the defendants had reasonable cause to believe that such intention existed. The case was submitted to the Superior Court on an auditor's report and a stipulation as to certain evidence before the auditor; and the judge found for the defendants.

The main contention of the plaintiff is that on the facts found by the auditor he was entitled as matter of law to a decision in his favor. He bases this claim on a single statement in the auditor's report "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold." This must be considered with reference to the facts on which it is based, and in connection with other findings of the auditor on the same subject matter. At most, by virtue of § 6 of the statute, it was *prima facie* evidence that the plaintiff did not intend that actual purchases and sales should be effected. After giving due weight thereto, the auditor found on the entire evidence before him "that the plaintiff did not at any time intend that there should not be any actual purchases or sales by the defendants, of the stocks he ordered bought or sold; that in some cases he intended the stocks should be bought or sold by the defendants as ordered; and in other cases he had no intention as to whether the defendants should or should not make actual purchases or sales in carrying out his orders."

The evidence on which the auditor came to this conclusion is not before us. It must stand unless we can say as matter of law that it is inconsistent with the other facts found by him. The general course of business between the parties, so far as disclosed by the entire report, indicates that genuine purchases and sales were contemplated, and were positively intended by the plaintiff in all but a few special cases. The dealings began on

November 3, 1911, when the plaintiff delivered to the defendants certain certificates of stock. On or before November 13, they had sold all of this stock on order of the plaintiff for $85,575.50. On November 11 he drew from them $10,000 in cash. On November 29 they received from the Exchange Trust Company one hundred shares of Great Northern stock, paying therefor, by order of the plaintiff, $12,000; and on December 16, 1911, by his order the defendants received from said trust company one hundred shares of Reading stock, and paid therefor $5,500. Other orders to buy and sell were given by him. On January 4, 1913, this account was closed, and the plaintiff was paid the amount owed. The second account was opened on September 12, 1913, when the plaintiff deposited $5,000; and was closed January 8, 1914. The last account was opened on June 26, 1914, and was closed on March 3, 1917. During the period covered by the declaration, the plaintiff gave orders to the defendants to buy and sell seventeen thousand nine hundred and twenty shares, at a total value slightly exceeding $3,101,000. In some cases the plaintiff paid the full purchase price, in other cases substantial amounts on account, for the stocks ordered to be purchased. The course of dealings throughout indicates genuine transactions, and not mere wagers under the guise of contracts for the purchase and sale of stocks. The plaintiff received dividends on stocks purchased for him and held in his account; and interest was charged when the balance of the account was against him.

The auditor found, "The plaintiff did not intend to demand or receive certificates of the stocks he ordered to be purchased, but to give orders later to sell the same amount of stocks, hoping to make a profit by selling at an increased price." The statute does not prohibit a broker from carrying on margin the stocks he has purchased for his customer. He further found, "In twelve (12) cases stock ordered by the plaintiff to be sold by the defendants was delivered to the defendants by the plaintiff, or by some one on the direction of the plaintiff, either before or after the order to sell. The plaintiff claims that in fourteen (14) cases he gave to the defendants orders to sell stock which he did not own. In eleven (11) of these cases I find that the plaintiff, at the time the order was given to sell, either owned the stock ordered to be sold or had purchased it of some broker other than the defendants and

had it in his control in an account with another broker or a Trust Company." In only three cases (and these do not appear in the declaration) did the plaintiff order the sale of stocks that he did not own, and in each of these a corresponding order to purchase was given within a few days. We cannot say, as matter of law, that the findings are inconsistent with the conclusion reached by the auditor.

The auditor's report made out a *prima facie* case for the defendants. At the trial in the Superior Court the plaintiff offered no additional evidence except certain letters. These were before the auditor, and tend to confirm his findings, by showing that the plaintiff intended the actual sale and delivery of the shares therein referred to. In addition to finding generally for the defendants, the trial judge filed a memorandum, in which he affirmed the finding of the auditor as to the plaintiff's intention, and also found that "the defendants did not have reasonable cause to believe that the plaintiff had any such intention," (i. e. an intention that there should be no actual purchase or sale of stock.) While this "Memorandum" is no part of the record (*Cohen* v. *Berkowitz*, 215 Mass. 68, 71), the general finding for the defendants "imports a finding of all the subsidiary facts essential to that conclusion." *Adams* v. *Dick*, 226 Mass. 46, 53. Assuming then that the auditor's finding on which the plaintiff relies, as to three alleged short sales, and the settlements made without the completion of the purchase or sale of the securities, created a *prima facie* case in his favor, under R. L. c. 99, § 6, they were not conclusive; and their effect was overcome in the mind of the auditor by other evidence before him. Apparently he was not satisfied that even in these few transactions the plaintiff intended that actual sales should not be effected, especially in view of the general course of his dealings from the beginning, which indicated that real transactions were contemplated. The trial judge was warranted in finding that the plaintiff had failed to make out a case under the wagering statute. *Chandler* v. *Prince*, 217 Mass. 451; *S. C.* 221 Mass. 495, 506. *Zembler* v. *Fitzgerald*, 234 Mass. 236. The facts as found distinguish this from cases like *Adams* v. *Dick*, 226 Mass. 46, and *Houghton* v. *Keveney*, 230 Mass. 49.

What has been said disposes of the plaintiff's exceptions to the judge's denial of his motion for a finding, and the refusal

to give the requests numbered 1 and 8. Those numbered 9 and 10 relate to damages, and were rendered immaterial by the finding for the defendants. In view of the finding that "the plaintiff did not at any time intend that there should not be any actual purchases or sales by the defendants, of the stocks he ordered bought or sold," it is unnecessary to consider requests 2, 3 and 7, which are based on the affirmative defence of actual sales.

Exceptions overruled.

EUGENE P. CONNELLY *vs.* DIONNE TRUCKING, INC., & another.

Suffolk. October 22, 1920. — November 23, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Attachment. Equity Pleading and Practice, Amendment. *Equity Jurisdiction,* To reach and apply equitable assets.

A creditor of a corporation named "D Trucking, Inc.," brought a bill in equity to reach and apply in payment of the debt property in the possession of a third person not attachable at law, and in the bill described the debtor as "D Trucking Co., Inc.," although he intended to describe "D Trucking, Inc." After the third party, having been served with a subpoena and order of notice, had entered into a stipulation in writing to hold until further order of the court funds in his hands owing to the debtor, a trustee process was served upon him as trustee in an action at law by another creditor against the same debtor, in which the debtor was correctly described. The conflicting claims of the creditors being brought before the court, the plaintiff in the suit in equity was permitted to amend his bill so that it correctly described the debtor and a final decree was ordered directing that his claim be paid first from the fund. The second creditor appealed. *Held,* that the amendment properly was allowed, since it resulted in the correction of a mere clerical error or misnomer without creating an actual change of existing parties or introducing a new demand or cause of action.

BILL IN EQUITY, filed in the Superior Court on July 22, 1919, to reach and apply, in payment of a debt alleged to be due from "The Dionne Trucking Co., Inc." or from "The Hall Motor Truck Co." to the plaintiff, a debt alleged to be owing to them from one H. P. J. Earnshaw.

The defendant trucking companies admitted the allegations of the bill. Earnshaw was served with a subpoena and an order of notice on July 28, 1919, and on August 7 entered into a stipula-

tion that he would hold, "pending the order of the Court," $971.60, which was in his hands and possession and owing either to the Hall Motor Truck Company or to "Dionne Trucking Co."

On August 7, also, "probably after the stipulation just referred to," (as the judge found) Earnshaw was served with a trustee process in an action by the Jenney Manufacturing Company against "Dionne Trucking, Inc." Earnshaw then filed an answer containing a prayer that it be determined to whom he should pay the money in his hands; and he thereupon was ordered to pay the sum of $971.60 into court and the plaintiff was ordered to give notice to Dionne Trucking, Inc., to the Jenney Manufacturing Company, and to certain other creditors of Dionne Trucking, Inc., to show cause why Earnshaw's prayer should not be granted.

The creditors appearing, the various claims were heard by *Wait*, J., a commissioner being appointed under Equity Rule 35 to take the testimony. Material findings of fact by the judge are described in the opinion. The plaintiff thereupon moved to amend his bill by correcting the description of Dionne Trucking, Inc., and the motion was allowed and by order of the judge a final decree was entered directing the payment to the plaintiff of $771.25 and costs taxed at $47.84 out of the funds paid into court by Earnshaw, and that the balance be held pending determination of an action at law brought by the Jenney Manufacturing Company. The Jenney Manufacturing Company appealed.

The case was submitted on briefs.

R. M. Bowen, for the Jenney Manufacturing Company.

J. J. Carraher, for the plaintiff.

CROSBY, J. This is a bill in equity by which the plaintiff seeks to recover a debt due him from the Hall Motor Truck Company of New England, or from the Dionne Trucking, Inc. The bill alleges that the defendants have no property which may be attached in an action at law. The defendants have admitted the allegations of the bill, and the alleged trustee has answered. As no question of jurisdiction is raised, we proceed to consider the only issue of law presented by the record.

The bill was filed on July 22, 1919, and the Dionne Trucking, Inc. is described therein as the "Dionne Trucking Co., Inc." A subpoena was served on the trustee Earnshaw on July 28, 1919,

and on the defendants on August 6, 1919; on August 7, 1919, Earnshaw was summoned as trustee in an action at law brought by the Jenney Manufacturing Company, the claimant in this suit, against the "Dionne Trucking, Inc." which is the corporate name of the defendant.

Without reciting all the proceedings in the case, the record shows that a hearing was had in the Superior Court at which the Jenney Manufacturing Company appeared and claimed that the attachment made by it of the funds in the hands of the trustee was valid against the plaintiff in this suit, because of the misnomer of the Dionne Trucking, Inc. in the bill. The judge filed a finding of facts, and ordered that a decree be entered directing that the plaintiff be paid $771.25 and taxable costs amounting to $47.84, out of the funds originally in the hands of the trustee, which were afterwards paid to the clerk of the Superior Court, the balance to be held to await the final determination of the action at law brought by the claimant. After the findings were made, the court allowed a motion to amend the bill by striking out the name "Dionne Trucking Co., Inc." wherever it appeared and substituting therefor "Dionne Trucking, Inc."; a final decree was entered in accordance with the order and the case is before us on the claimant's appeal.

The only error in the description of the defendant in the bill was in the insertion of "Co." after the word "Trucking." The judge found the following, among other facts: that there was no mistake on the part of the plaintiff as to the corporation intended to be described, that the trustee Earnshaw was not misled by the mistake in the name and knew that "'Dionne Trucking, Inc.' was the person the plaintiff had in mind as 'The Dionne Trucking Co., Inc.'"; that "From first to last there has been no mistake or misunderstanding on the part of any one as to the person intended to be dealt with under the varied appellations. That person was Dionne Trucking, Inc."

In view of these findings which, upon the evidence and the reasonable inferences to be drawn therefrom, we cannot say were unwarranted, we are of opinion that the decree should stand. The amendment did not create an actual change of existing parties, nor did it have the effect of introducing a new demand or a new cause of action; it resulted in the correction of a mere clerical

error or misnomer. The defendant appeared and admitted the indebtedness and raised no question as to the correctness of its corporate name as described in the bill. Earnshaw also appeared and admitted his indebtedness either to the Hall Motor Truck Company of New England or the Dionne Trucking, Inc. There is nothing to show that there was any such corporation as the "Dionne Trucking Co., Inc." Accordingly *Mathews Slate Co.* v. *Sweeney*, 219 Mass. 285, and *Frank* v. *Millen*, 226 Mass. 71, are to be distinguished from the present case. The mistake was not material to the merits of the case and there is no evidence that the claimant had any reason to believe that the plaintiff did not intend actually to bring his bill against Dionne Trucking, Inc.; it was not prejudiced by the amendment and its attachment is subject to the rights of the plaintiff. *Wight* v. *Hale*, 2 Cush. 486. *Vermilyea* v. *Roberts*, 103 Mass. 410. *Cain* v. *Rockwell*, 132 Mass. 193. *Norris* v. *Anderson*, 181 Mass. 308. *Bollwerk* v. *Hirshon*, 227 Mass. 375. The cases of *West* v. *Platt*, 116 Mass. 308, *Terry* v. *Sisson*, 125 Mass. 560, and *Jordan Marsh Co.* v. *Hale*, 219 Mass. 495, relied on by the claimant, are plainly distinguishable in their facts from the case at bar.

Decree affirmed with costs.

MARGARET W. MERRILL *vs.* CITY OF LOWELL.

Middlesex. October 18, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Lowell. Municipal Corporations, City council, Emergency appropriation.

Where land had been taken by the city of Lowell by right of eminent domain and the owner had brought a petition for a jury for the assessment of his damages and had received, as payment *pro tanto* and without prejudice, a sum of $19,650 which the council previously had awarded on his claim, a vote of the city council, while the action of the landowner was pending, to pay to him the further sum of $2,772.51 "in settlement of" the cause of action, although it recites that it is a vote "of urgent necessity for the immediate preservation of the public peace, health and safety," is not such a vote and, if it is passed without having been proposed in writing and without a notice of it having

been published in a newspaper of the city not less than one week before its passage, it is void under § 27 of the charter of the city of Lowell, St. 1911, c. 645.

The requirement of § 27 of the charter of the city of Lowell, St. 1911, c. 645, that a vote of the city council of five members, appropriating money in excess of $500 or authorizing a contract involving liability in excess of $500 in a matter for the immediate preservation of the public peace, health or safety, to be valid must be passed by a four fifths vote, is not satisfied by a unanimous vote at a meeting of the council when only three members are present.

Whether the requirement of St. 1911, c. 645, § 27, that a vote of the city council of Lowell upon such a matter as above described shall contain a statement of its urgency is satisfied by a mere statement, "This vote is of urgent necessity for the immediate preservation of the public peace, health and safety," without mentioning the particular facts constituting the emergency, was not determined.

CONTRACT for $2,772.51, which the plaintiff alleged that the defendant agreed to pay to her in compromise of her claim against the city for land taken by the defendant by right of eminent domain. Writ dated February 16, 1917.

In the Superior Court the action was heard by *King*, J., without a jury, upon an agreed statement of facts. Material facts so agreed upon are described in the opinion. The judge found the facts to be as stated in the agreed statement and reported the action to this court for determination, the parties agreeing that, if the plaintiff was entitled to recover, judgment should be entered in her favor for $2,772.51 and interest from the date of the writ; and that otherwise judgment should be entered for the defendant.

W. A. Hogan, for the plaintiff.

W. D. Regan, for the defendant.

CARROLL, J. The plaintiff's land was taken on November 18, 1915, by the defendant for municipal purposes. She was awarded damages in the sum of $19,650, which she refused to accept and brought a petition for a jury to assess the damages. The petition is now pending. On June 24, 1916, the defendant tendered to the plaintiff the amount awarded with interest, which the plaintiff accepted as payment *pro tanto*, without prejudice to her rights. St. 1904, c. 317. At a meeting of the municipal council of the city of Lowell on December 26, 1916, at which three members were present, it was voted to pay the plaintiff the sum of $2,772.51 "in settlement of a cause of action brought by her for damages in the matter of Dummer Street taking, said amount being in addition" to the sum already accepted in payment *pro tanto*. It was stated in the order, "This vote is of urgent necessity for the

immediate preservation of the public peace, health and safety." At the meeting on December 26, the three members present voted in the affirmative. At the meeting of the municipal council held on January 8, 1917, the treasurer was directed not to pay the sum awarded the plaintiff by vote of December 26, 1916. On January 27, 1917, the plaintiff tendered to the city a deed of the land taken, and an agreement for judgment and execution in the sum of $2,772.51. The deed and agreement were not accepted. On February 16, 1917, the plaintiff brought this action of contract to recover the sum of $2,772.51. On April 26, 1917, the municipal council rescinded the vote of December 26, 1916, at which meeting the four members present voted in the affirmative.

St. 1911, c. 645, § 27, provides that the municipal council of the city of Lowell shall not pass an order, resolution or vote appropriating money in excess of $500, or authorize a contract involving a liability in excess of $500, unless proposed in writing and unless a notice is published in a newspaper of the city not less than one week before its passage, except an order, resolution or vote for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by a four fifths vote. Previous to the meeting of December 26, 1916, the vote ordering payment of $2,772.51 to the plaintiff was not submitted in writing to the municipal council and notice was not published in a newspaper as required by the statute.

A statement of the facts showing the urgency for the immediate preservation of the public peace, health or safety was not contained in the vote. It declared generally that "This vote is of urgent necessity for the immediate preservation of the public peace, health and safety," without mentioning the particular facts constituting the emergency. We do not think it necessary, however, to decide whether the absence of this statement of facts rendered the vote invalid. See in this connection Amendments to the Constitution of Massachusetts, art. 48, The Referendum, II, Emergency Measures.

The only authority given the municipal council of Lowell to make an appropriation or enter into a contract in excess of $500 without the publicity required by St. 1911, c. 645, § 27, was to preserve the public peace, health or safety, and when the necessity for its preservation was immediate. The authority of the

council was defined and limited. If the public health, safety or peace was not involved, or its immediate preservation was not demanded, then the appropriation of the public money was illegal and the contract cannot be enforced. *Green* v. *Everett*, 179 Mass. 147. *Webb Granite & Construction Co.* v. *Worcester*, 187 Mass. 385. *United States Drainage & Irrigation Co.* v. *Medford*, 225 Mass. 467, 472.

The meaning of the words in the statute limiting expenditures in excess of $500 is plain. The Legislature gave the municipal council power and authority to appropriate the public funds in excess of $500 when the occasion demanded immediate action for the public good. The council, as the body entrusted with the responsibility of expending these funds, could do so only in the manner and for the purposes authorized by the statute. The provision requiring publication in a newspaper before making the appropriation was enacted for the benefit of the taxpayers and to protect their money from ill-advised action, and only in the event of some emergency calling for the prompt protection of the public peace, health or safety, could this provision be departed from. It was not intended that the name of the public health, peace or safety was to be invoked as a mere pretext for evading the statute. It did not follow, from the general declaration, that the health, peace or safety of the public was involved and the call urgent, that this statement was true. The vote on its face shows that no such question was before the council, and it cannot be even imagined how the settlement of the plaintiff's petition for the assessment of land damages could be so urgent as to concern the immediate preservation of the public health, peace or safety within the meaning of the statute. The mere statement of the vote shows that no such question was really involved.

The municipal council of the city of Lowell consists of the mayor and four aldermen, to whom are entrusted the control and management of all its affairs, with the exception of the public schools. The statute provides that the majority of the members of the council shall constitute a quorum, that the mayor shall have the right to vote, and that the affirmative vote of at least three members shall be necessary for the passage of any order, ordinance, resolution or vote. St. 1911, c. 645, § 24. For the enactment of an emergency measure as described above, a four

fifths vote is necessary. The plaintiff contends that a four fifths vote means four fifths of the quorum voting, and as the vote of December 26 was passed by all members present, that the statute was complied with. In the absence of statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of the quorum can act. *Williams* v. *School District in Lunenburg*, 21 Pick. 75, 82. See *Sargent* v. *Webster*, 13 Met. 497, 504; and in *National Prohibition Cases*, 253 U. S. 350, it was said at page 386, "The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present — assuming the presence of a quorum — and not a vote of two-thirds of the entire membership, present and absent." These well established principles are not applicable, however, to the municipal council of Lowell, for the reason that it is specifically provided in the charter of the city that an affirmative vote of at least three members is essential for the passage of every order, ordinance, resolution or vote. If the order authorizing the settlement of the plaintiff's claim was proposed in writing and notice published as required by the statute, it could have been passed by the affirmative vote of three members. Although the orders and votes of the council for the transaction of the usual routine business of the city could be carried by three votes, the Legislature did not intend that an extraordinary proceeding for the relief of the city, when its health, peace or safety was in peril — a proceeding which might involve an unusual and large expenditure of money and which was safeguarded by a four fifths vote and a statement of the emergency — should be passed by a vote no larger than that required for the conduct of the ordinary business of the municipality. The words, "passed by a four fifths vote" in § 27 construed in connection with § 24, would be without effect and meaning if this important measure for the relief of the city provided for in § 27 could be enacted by the vote of three members. Something more than a vote of three members was plainly intended, and as more than three votes in the affirmative were essential for a measure of this kind the intent of the Legislature was that four votes were essential for its enactment.

If the statute stated in terms that a four fifths vote of all the members of the municipal council or of those elected as members

of the council was necessary for the enactment of such an order, or if some similar expression were used in the charter, it would probably be agreed that the vote of three members would not be sufficient for the passage of an emergency measure. *Tracy Cement Tile Co.* v. *Tracy*, 143 Minn. 415. *Stanton* v. *Hoboken*, 23 Vroom, 88. *Suburban Electric Co.* v. *Elizabeth*, 30 Vroom, 134. The governing principle of these cases is to be followed here. It is our opinion, therefore, that more than three affirmative votes were indispensable for the passage of this order, and as it was not passed by a vote of four fifths of all the duly elected members of the council and did not concern the immediate preservation of the public peace, health or safety, the plaintiff cannot recover.

According to the report judgment is to be entered for the defendant; and it is

So ordered.

JULIA GROSS *vs.* MAX COHEN.

Suffolk. October 19, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Agency, Ratification of acts of agent. *Landlord and Tenant.*

The bringing by the lessor named in a lease in writing and under seal of an action against the lessee for breach of the contract to pay rent is a ratification by the lessor of the signing, sealing and delivery of the lease in his name, although it was so executed and delivered by one who had no authority to do so.

The execution and delivery of a lease of real estate on behalf of the lessor by one who had no authority so to do may be ratified by the lessor although the instrument contains no statement that it was executed by an agent.

CONTRACT for rent alleged to be due under a lease in writing and under seal. Writ in the Police Court of Chelsea dated December 21, 1917.

On appeal to the Superior Court, the action was tried before *Fox*, J. It appeared that the lease was signed and sealed in behalf of the plaintiff by her sister-in-law, who testified that she had authority in writing to do so, but that she did not know whether such authority was under seal. The authority in writing was not produced. Other material evidence is described in the opinion.

At the close of the evidence, the judge denied a motion by the defendant that a verdict be ordered for him. At the request of the plaintiff and subject to exceptions by the defendant, the judge ruled as follows:

"1. Where a lease of real estate is executed by an agent of the lessor in the lessor's name and he affixes thereto a seal where none is required (the lease being one for one year with the option for another year), this does not render the lease invalid although the agent's authority is not under seal.

"2. The authority to execute a lease of real estate for one year, with the option for another year, need not be in writing. Parol authority is sufficient."

The defendant asked for and the judge refused the following rulings:

"1. The written lease under seal upon which the plaintiff has brought suit was not signed by the plaintiff or by any one having legal authority so to do.

"2. The authority of the agent to sign the principal's name, in the absence of the principal, to an instrument under seal, must in itself be in writing and under seal.

"3. A general authority given by parol by the plaintiff to Rosie Gross to sign any paper or document which said Rosie Gross might see fit to sign in the name of the plaintiff is not sufficient to authorize the execution of the lease under seal upon which suit is brought."

The jury found for the plaintiff in the sum of $272.25; and the defendant alleged exceptions.

R. W. Frost, for the defendant.

A. M. Graham, for the plaintiff.

JENNEY, J. This is an action upon a lease under seal purporting to have been made by Julia Gross, the plaintiff, to Max Cohen, the defendant, and to Max Ruben, who is not a party to this proceeding.

The defendant occupied the demised premises as lessee for five months, and paid the rent accruing under the lease for that time. There was no evidence as to why his occupation ceased. The plaintiff claims that she is entitled to recover the rent for seven months included in the term for which the lease was given, and for which no payment has been made. The defence is based

solely upon the contention that the instrument never was properly executed by the plaintiff or in her behalf.

Even if the person who admittedly signed the lease with the plaintiff's name had no authority so to do, the bringing of this action thereon by the plaintiff constituted a ratification of its execution. The defendant, so far as is shown by the record, had not attempted previous to that time to avoid the instrument, because of any lack of authority in the agent who executed it, if it be assumed, but not decided, that he could have repudiated the lease after he had enjoyed possession under it. He could not object to a ratification by the plaintiff. *Codman* v. *Hall*, 9 Allen, 335. *Ripley* v. *Cross*, 111 Mass. 41. *Clark* v. *Gordon*, 121 Mass. 330. See Mechem on Agency, §§ 513–524; 21 R. C. L. 922; 5 Am. St. Rep. 109, note. In Massachusetts, instruments executed by one person in behalf of another may be ratified by parol, even though a seal is necessary for their validity. *McIntyre* v. *Park*, 11 Gray, 102. *Holbrook* v. *Chamberlin*, 116 Mass. 155. *Rand* v. *Farquhar*, 226 Mass. 91, 97. See also *Kostopolos* v. *Pezzetti*, 207 Mass. 277; *Albiani* v. *Evening Traveler Co.* 220 Mass. 20. The institution of an action in which the plaintiff sought to enforce rights under an instrument purporting to be made in her name was a clear election to be bound by and to rely upon its terms, and consequently, as a matter of law, a ratification thereof. *Finney* v. *Fairhaven Ins. Co.* 5 Met. 192. *Clews* v. *Jamieson*, 182 U. S. 461, 483. *Shoninger* v. *Peabody*, 57 Conn. 42. *Grafton* v. *Follansbee*, 16 N. H. 450. The instrument could be ratified, although it did not purport to be executed by an agent. *Merrifield* v. *Parritt*, 11 Cush. 590. *Greenfield Bank* v. *Crafts*, 4 Allen, 447. *Bartlett* v. *Tucker*, 104 Mass. 336, 339.

The plaintiff having ratified the lease declared upon, the question of the original authority of the agent to execute it is immaterial. The defendant was not injured by the refusal of his requests, all of which related only to that subject. A verdict could not have been ordered rightly for the defendant for the reasons stated.

Exceptions overruled.

MORRIS COHEN *vs.* ISADORE WINTMAN.

Suffolk. October 19, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Implied, Performance and breach.

One, who in June, 1917, delivered $426 to another in consideration of his agreement to transmit it to a bank in Russia and to procure therewith a bank book for two thousand rubles, which book was to be delivered to the depositor of the money upon his paying therefor $56 more, may maintain against the person who thus received the money, upon an unjustifiable failure on his part to perform any part of the agreement, an action of contract for money had and received to recover the $426 so paid with interest, his remedy not being restricted to an action for breach of the agreement nor his damages limited to the value of two thousand rubles at the time when the bank book should have been delivered to the depositor.

CONTRACT for $500, money had and received by the defendant to the plaintiff's use according to an account annexed which contained one item only, "Cash money delivered to you $500." Writ dated July 10, 1918.

In the Superior Court the action was tried before *Morton*, J. Material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in his favor, and also requested that the jury be instructed that "upon all the evidence the verdict should be for the defendant and that there was no evidence from which the jury could determine the value of a bank book for two thousand rubles on a Russian bank book in money of the United States at the time it should have been delivered to the plaintiff." The motion was denied and the request refused. The jury found for the plaintiff in the sum of $465.82; and the defendant alleged exceptions.

The case was submitted on briefs.

S. R. Cutler, H. W. James & G. E. Gordon, for the defendant.

S. L. Bailen & F. Leveroni, for the plaintiff.

JENNEY, J. The evidence was amply sufficient to justify a finding by the jury that in June, 1917, the plaintiff paid to the defendant $426, in consideration of his agreement to transmit

the amount to a bank in Petrograd, Russia, and to procure therewith a bank book for two thousand rubles, which was to be delivered to the plaintiff, who on its receipt was to pay the defendant $56 more. No time being stated in the agreement, it was the duty of the defendant to perform his obligation within a reasonable time. The evidence also warranted a finding that the defendant never transmitted any of the money so received, although he testified to the contrary, and that he unjustifiably failed to perform any part of the contract. No bank book was ever delivered to the plaintiff, who waited "a great many months" before instituting this action on July 10, 1918.

At the close of the evidence, the defendant duly moved that a verdict be ordered in his favor, and also requested the trial judge to instruct the jury that "upon all the evidence the verdict should be for the defendant." He excepted to the denial of his motion and to the refusal of his request. The case was submitted to the jury, who found for the plaintiff.

The exceptions must be overruled. A wrongful and entire failure by the defendant to perform the contract authorized its rescission by the plaintiff, and entitled him to recover the amount paid, upon a count for money had and received. The plaintiff was not bound to affirm the contract by an action for damages suffered by reason of the defendant's non-performance. *Brown* v. *Harris*, 2 Gray, 359. *Minturn* v. *Warren Ins. Co.* 2 Allen, 86, 89. *Ballou* v. *Billings*, 136 Mass. 307. *R. H. White Co.* v. *Remick & Co.* 198 Mass. 41, 47. *Runkle* v. *Burrage*, 202 Mass. 89, 99. *Martin* v. *James Cunningham, Son & Co.* 231 Mass. 280.

Exceptions overruled.

CHARLES A. McMAHON'S (dependent's) CASE.

Suffolk. October 19, 20, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Injuries to which act applies. *Evidence*, Presumptions and burden of proof, Matter of conjecture.

Upon a claim for compensation under the workmen's compensation act by the dependent mother of one who met his death while employed as a "bus boy" in a restaurant, it appeared that the dining room and kitchen of the restaurant were on the second floor of a building, that an elevator ran from the basement of the building to and beyond the second floor, that the opening from the elevator well at the second floor was into the kitchen and was by means of doors, one moving up and the other down in opening, that, when the doors were locked or fastened, they could be opened only from within the elevator, that at times the doors failed to catch as they came together, that then they could be opened from outside the elevator and that if, when that was done, the lower door did not open all the way down, where there was a catch to hold it, it would close of itself. There was evidence that the operator of the elevator finished his employment at six o'clock in the evening and left the elevator in the basement and that the doors into the elevator well at the second floor were closed. There was no evidence that the doors were fastened, nor any evidence that they were open. It appeared that, if the elevator was "not stopped right still," it would "gradually work" up or down, "whichever way the power is." When last seen, between 6:15 and 6:30 o'clock in the evening, the employee had completed a task in the kitchen of cleaning a water cooler and was standing beside the elevator well. From one to ten minutes later an outcry was heard and his dead body immediately afterwards was found at the bottom of the elevator well. The elevator then was at the top of the shaft and the doors into the well on the second floor were closed. It was no part of the employee's work to operate the elevator and he had been instructed not to use it and not to go near it. *Held*, that all the facts and circumstances shown and every reasonable inference therefrom left conjectural what the employee was doing when he fell into the well and what was the exact cause of his death; and that the claimant therefore had not established her claim.

CERTIFICATION, filed in the Superior Court in proceedings under the workmen's compensation act, of a decision of the Industrial Accident Board finding and ruling that Charles A. McMahon met his death from injuries which arose out of and were sustained in the course of his employment by D. L. Page Company, and awarding compensation to his mother.

In the Superior Court by order of *Fox*, J., a decree was entered in accordance with the decision of the Industrial Accident Board. Material facts found by the board are described in the opinion. Both the claimant and the insurer appealed.

S. E. Qua, for the claimant.

J. W. Cronin, for the insurer.

CARROLL, J. Charles A. McMahon was killed on the night of September 9, 1918, between six and seven o'clock. At the time of his death he was fifteen years of age. The dining room and kitchen of the restaurant, where he was regularly employed as a "bus boy," were on the second floor of the building. In one corner of the kitchen there was a freight elevator. Its shaft extended from the basement to the top of the building and was guarded by heavy doors which were supposed to be closed and fastened when the elevator was not at the floor. He had been engaged in cleaning a water cooler situated in a passageway between the dining room and kitchen. At a quarter past six, when this work was finished, he was seen by the head waiter and when next seen he was standing in the kitchen near the elevator. The employee who saw him in this position stated that she did not know how long he had been there, that she went from the place where she was working to the sink, about half way across the kitchen, and returned immediately, when an outcry was heard, and the dead body was found at the bottom of the shaft. It was estimated that from one to ten minutes elapsed from the time he was last seen alive until the outcry was heard.

The upper and lower doors of the elevator, guarding the entrance to the shaft, when locked or fastened could be opened only from the inside of the elevator. At times the doors failed to catch as they came together. When this happened, the doors could be opened from the kitchen by downward pressure on the lower door, and, if so opened, and it did not open all the way down to the bottom, where there was a catch, to hold it open, it would close of itself. There was also evidence that the catch holding the door open "might not be released when the elevator went up." The elevator operator testified that he finished his work at six o'clock and left the elevator in the basement and the doors on the second floor were closed. No one testified the doors were open, and there was no evidence that they were locked or fastened.

When the boy was found, according to the evidence, the elevator was at the top of the shaft and the doors on the second floor were closed. It also appeared that if the elevator "is not stopped right still, it will gradually work" up or down, "whichever way the power is."

If there is any evidence or if it can be rationally inferred that the employee fell into the elevator well while in the course of his employment either because the doors were open, or he accidentally fell against them and pushed them open, then the finding of the Industrial Accident Board must stand. It was no part of the employee's work to operate the elevator. He had been instructed not to use nor "go near it" and if there is no evidence to support the finding of the board or if on the whole evidence and drawing every reasonable inference, it can only be conjectured in what manner and from what cause he met his death, so that the mind is left in suspense and doubt whether he was at the time within the scope of his employment or attempting to use the elevator for purposes of his own, and where one conclusion is as rational as the other, then the cause of his death is a matter of mere speculation and it has not been shown as required by the workmen's compensation act, that the injury arose out of or in the course of his employment. *Dube's Case,* 226 Mass. 591. *Sanderson's Case,* 224 Mass. 558. *Savage's Case,* 222 Mass. 205.

Even if the evidence showing that the doors were closed at six o'clock was discredited, there was nothing to show they were open, and unless they were open at the time of the injury the fatality could not have occurred. The boy may have accidentally opened them by falling against them, or he may have intentionally opened them for the purpose of using the elevator; but what actually happened on the evidence disclosed is entirely a matter of conjecture.

According to the operator's testimony, the elevator was left by him in the basement. After the fatality, it was found at the top of the shaft. If the employee attempted to operate it, the position of the elevator would be accounted for. On the other hand, there was evidence that when the elevator was not fully stopped, it would gradually move in the direction of the power, and if the board could assume that because of this the elevator could gradually move to the top of the shaft, it was still a matter

of doubt what caused it to rise. The elevator may have been entirely stopped by the operator. The direction of the power may have been such that the elevator would not ascend, and on all the evidence it could not be reasonably inferred, to the exclusion of other inferences, that the elevator moved from its position at the basement by the mere force of the power, or was started by some one other than the employee himself. Taking all the facts and circumstances shown, and drawing every reasonable inference, it is not disclosed in what manner or from what cause the doors became open, and no satisfactory explanation is given for the location of the elevator at the top of the shaft. What the employee was doing at the time or the exact cause of the fatality cannot be proved with any degree of certainty. These are all matters of pure conjecture and the claimant's case is not established. *Sanderson's Case, supra. Savage's Case, supra. Dube's Case, supra.*

The case at bar is clearly distinguishable from *Von Ette's Case,* 223 Mass. 56.

As the claimant cannot recover we have not considered the other questions argued.

Decree reversed.
Decree for the insurer.

NELLIE HAYES *vs.* METROPOLITAN LIFE INSURANCE COMPANY.

Suffolk. October 20, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Insurance, Life. *Agency,* Scope of authority. *Evidence,* Extrinsic affecting writings.

Where a policy of life insurance provides that premiums shall be paid weekly and that a "grace of four weeks shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force," an authorization by the insurance company of its agents to collect overdue premiums together with one week's advance premium, provided the premiums are not more than thirteen weeks in arrears and the insured is alive but "irrespective of the fact that the grace period has expired or of the health or presence at the time of collection of the former insured," upon which payment the former insured shall "be regarded as having been wholly restored to benefit," does not require an agent to accept such payment of overdue premiums.

If an agent, in the circumstances above described, refuses to accept a tender, made more than four weeks but less than thirteen weeks after a failure to pay a premium subsequent to the first, of an amount equalling all arrearages of premiums and one week's premium in advance, the policy, which had lapsed, is not reinstated.

It appearing that the policy above described also provided in substance that its terms could not be changed nor its conditions varied except by a written agreement signed by the president and the secretary of the company and that agents were not authorized and had no power to make, alter or discharge contracts and waive forfeitures, evidence at the trial of an action upon the policy tending to show that a collecting agent of the company told the beneficiary that the policy did not lapse until thirteen weeks' payments were overdue was *held* not to be sufficient to modify the policy or to constitute a waiver of its provisions.

CONTRACT for $216 by the beneficiary under a policy of insurance issued by the defendant upon the life of Nora T. Hayes. Writ dated June 1, 1915.

In the Superior Court the action was tried before *Callahan*, J. Material evidence is described in the opinion. By order of the judge the jury returned a verdict for the defendant, and the judge reported the case to this court for determination.

B. J. Killion, for the plaintiff.

W. P. Kelley, for the defendant.

JENNEY, J. Nellie Hayes brings this action upon a policy of insurance issued by the Metropolitan Life Insurance Company on the life of her daughter, Nora T. Hayes. The policy was issued on November 24, 1913. The assured died on July 1, 1914.

The defence is based upon the contention that the policy lapsed during the life of the assured, because of non-payment of the premiums, payable weekly with a "grace period of four weeks." It was admitted that the premiums had been paid to April 13, 1914. The plaintiff did not claim that the premiums were paid as required by the policy, but "relied on a tender alleged to have been made by . . . [her] to one Julian, employed as an agent by the defendant." A verdict having been ordered for the defendant, the case is here upon the report of a judge of the Superior Court.

For the purposes of the case, we assume that the jury could have found that on June 30, 1914, the beneficiary made a sufficient tender of the amount required to pay the premiums then due and for one week in addition, which tender was not accepted.

The policy in the "Conditions" and "Privileges and Con-

cessions to Policy-holders" printed thereon provided: "This Policy contains the entire agreement between the Company and the insured and the holder and owner hereof. Its terms cannot be changed or its conditions varied, except by a written agreement, signed by the President or Secretary of the Company. Therefore, Agents (which term includes Superintendents and Assistant Superintendents) are not authorized and have no power to make, alter or discharge contracts, waive forfeitures, or receive premiums on Policies in arrears more than four weeks, or to receipt for the same in the Receipt Book, and all such arrears given to an Agent shall be at the risk of those who pay them, and shall not be credited upon the Policy, whether entered in the Receipt Book or not."

"Grace Period. A grace of four weeks shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the days of grace, the overdue premiums shall be deducted from the amount payable hereunder, but neither this concession nor the acceptance of any overdue premium shall create an obligation on the part of the Company to receive premiums which are in arrears over four weeks."

"Revival. Should this Policy become void in consequence of non-payment of premium, it may be revived, if not more than fifty-two premiums are due, upon payment of all arrears and the presentation of evidence satisfactory to the Company of the sound health of the insured."

In accordance with its terms, the policy had lapsed before the tender was made.

The defendant, however, had authorized its agents to collect overdue premiums together with one week's advance premium, provided that the premiums were not overdue and unpaid for more than thirteen weeks, and had prepared for their use a form of report to it by the collecting agent, stating that he had collected the amount of arrears and had entered it in the policy holder's premium receipt book. In this notice, the agent requested that "the policy be officially revived." On the back of this form there was printed, among other provisions entitled "'Discretionary Period' Instructions," the following: "Any Industrial policy which is not more than thirteen weeks in arrears

may be collected upon by any authorized person, — that is to say, the Superintendent, a Deputy, General or Assistant Superintendent, an Agent or an Office Clerk, — irrespective of the fact that the grace period has expired or of the health or presence at the time of collection of the former insured; provided: that the insured is alive and that the full arrears up to and including the following Monday be collected in one sum. Thereupon such collection may be entered in the P. R. B., and signed by the authorized person making the collection; the former insured will then be regarded as having been wholly restored to benefit."

"'Notification of Collection of Arrears,' must immediately be completed as to each policy, and forwarded to the Home Office, that the transaction may be completed by the official revival of the policy."

The defendant argues that this authority and the instructions quoted did not control the stated provisions of the policy. It is assumed, but not decided, that the policy had been so modified, and that the agent to whom the tender was made was authorized to receive the amount and to reinstate the policy. It is clear, however, that the agent was not obliged to accept the tender and reinstate the lapsed policy, although thirteen weeks' payments were not in arrears. It was the option of the defendant acting through its agent so to do, and there was no absolute right of reinstatement on the part of the policy holder.

The evidence that a collecting agent of the company told the beneficiary that the policy did not lapse until thirteen weeks' payments were overdue was not sufficient to modify the policy or to constitute a waiver of its provisions. Under its terms, the agent had no authority to make such modification or waiver. *Porter* v. *United States Life Ins. Co.* 160 Mass. 183.

The premiums were paid to an agent of the company after the death of the insured, but the plaintiff claims no right of recovery because thereof.

In accordance with the terms of the report, judgment must be entered for the defendant.

So ordered.

EARLE MORGAN *vs.* J. MURRAY FORBES & another.

Suffolk. October 21, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Construction. *Sale. Option. Equity Jurisdiction*, Specific performance.

A contract in writing dated on a May 30 recited that the owner of certain land with a house thereon "hereby agrees to sell to" the second party to the contract the land in question; that the price to be paid by the second party was $12,000 "on delivery of deed on or before September 1 . . . without interest;" that the second party "herewith has paid Five hundred dollars ($500) as bargain money, to be forfeited in case he fails to pay the balance of $11,500 on or before September 1;" that it was agreed that the second party might "enter upon the premises after ten days from the date hereof, to make repairs or additions to said house on the understanding that such repairs or additions shall belong to the estate free of charge, in case" the second party should "fail to complete his payment of $11,500 on or before September 1;" that the second party should "be responsible for all bills and charges incurred in making such repairs or additions, free from any mechanic's lien;" that the second party agrees "to take over the present insurance on said house on receipt of deed, paying *pro rata* for the unexpired portion of the policies and also the cost of Mechanics' Privilege for work contemplated;" that, "Should said house be destroyed or damaged by fire, before the final payment of $11,500 has been made, the insurance recoverable shall belong to" the second party "as if the purchase had been completed and deed given to him, and the fact of such destruction or damage shall not invalidate or affect the final payment of $11,500 for the land;" that the second party should pay one half of the local tax assessed for the current year; that an occupant then on the premises should remain until September 1 "or until the final payment of $11,500 has been made, in case she wishes to remain with the work going on," and that, if she did not so wish, the second party was to provide a resident caretaker or pay the additional premium of insurance rendered necessary by the house being unoccupied. *Held*, that the contract was not a mere option, but was one of purchase and sale binding both parties.

In a suit in equity by the purchaser against the owner for specific performance of the contract above described, it appeared that there was no agreement for extension of the time within which the contract was to be performed and that the plaintiff did not tender performance on the day named. There was evidence that, after the making of the contract, the purchaser had entered upon the premises and at considerable expense had made repairs during June, July, August and September; that the repairs were necessary in order that the purchaser might obtain the money for the final payment by a loan to be secured by a mortgage upon the premises; that the purchaser made an application for the loan, which was refused by one bank, and that an application to a second bank had to be made; that the defendant was absent from the Commonwealth during August and a portion of September; that, in response to a telephone message

that the deed of the defendant was ready at a certain bank, the plaintiff went to that bank and was told that a temporary delay would be satisfactory; that the plaintiff reasonably did not expect that he would be held to a strict performance of the contract; that on September 30 the plaintiff tendered performance, which the defendant refused, and that the refusal was not because of the failure of the plaintiff to perform on September 1, but because the defendant was informed that the plaintiff "built shabby houses." The trial judge found in substance that time was not regarded by the parties as of the essence of the contract and that the plaintiff's tender was made within a reasonable time, and a decree directing specific performance was entered. On appeal by the defendant, it was *held* that the findings were warranted and that it would have been inequitable to have refused relief to the plaintiff.

BILL IN EQUITY, filed in the Superior Court on October 9, 1919, for specific performance of a contract in writing alleged to be for the purchase by the plaintiff and the sale and conveyance by the defendants of certain real estate on Pleasant Street and Brook Road in Milton.

The contract was dated May 30, 1919, and was signed by J. Murray Forbes and Earle Morgan. The first paragraph recited that "Forbes hereby agrees to sell to said Morgan the house and land," describing it. The remaining paragraphs were as follows:

"Second. The price to be paid by said Morgan is Twelve thousand dollars ($12,000) on delivery of deed on or before September 1, 1919, without interest.

"Third. The said Morgan herewith has paid Five hundred dollars ($500) as bargain money, to be forfeited in case he fails to pay the balance of $11,500 on or before September 1, 1919. It is agreed that said Morgan may enter upon the premises after ten days from the date hereof, to make repairs or additions to said house on the understanding that such repairs or additions shall belong to the estate free of charge, in case said Morgan shall fail to complete his payment of $11,500 on or before September 1, 1919. The said Morgan shall be responsible for all bills and charges incurred in making such repairs or additions, free from any mechanic's lien.

"Fourth. The said Morgan agrees to take over the present insurance on said house on receipt of deed, paying *pro rata* for the unexpired portion of the policies and also the cost of Mechanics' Privilege for work contemplated. The said policies are for $4,500 and expire on August 16, 1920. Should said house be destroyed or damaged by fire, before the final payment of $11,500 has been

made, the insurance recoverable shall belong to said Morgan the same as if the purchase had been completed and deed given to him, and the fact of such destruction or damage shall not invalidate or affect the final payment of $11,500 for the land.

"Fifth. The said Morgan further agrees to pay one half the local tax assessed for 1919 on house and land. It being agreed that the valuation of the land shall be taken as one half the assessed value of the total land on both sides of Brook Road, belonging to the Estate. In 1918 the house was assessed at $2,000 and the land on both sides of Brook Road at $15,000.

"Sixth. It is agreed that the present occupant of the house may remain until Sept. 1, 1919, or until the final payment of $11,500 has been made, in case she wishes to remain with the work going on. If the present occupant does not wish to remain, the said Morgan shall provide a resident caretaker or else pay the additional premium of insurance for allowing the house to be unoccupied. The present occupant to have the vegetables and use of garden for this season."

The suit was heard by *Hammond*, J., a commissioner having been appointed under Equity Rule 35 to take the testimony. The judge ruled in substance that the contract "was not merely an option agreement binding the defendants alone, but was a bilateral contract by which the defendants agreed to sell and the plaintiff undertook to purchase the property," found "that the provision of the contract that the deed should be delivered and the money should be paid 'on or before September 1, 1919,' was not so important in the eyes of the parties as to make performance on or before that date an essential part of the contract," that it did not appear "either from the contract itself or from the attending circumstances, that time was regarded by the parties as of the essence of the contract," and that a tender by the plaintiff on September 30, 1919, "was an offer to perform within a reasonable time;" and ordered a decree for the plaintiff. A final decree directing specific performance having been entered, the defendants appealed.

F. Rackemann, (*H. M. Davis* with him,) for the defendants.

W. V. Taylor, (*H. W. Loker* with him,) for the plaintiff.

CARROLL, J. An agreement in writing relating to the conveyance of real estate in Milton was entered into on May 30, 1919.

The price was $12,000, to be paid by the plaintiff on or before September 1, 1919, when the deed was to be delivered. Tender of payment was not made until September 30, 1919. On October 9, 1919, this suit in equity was brought for the specific performance of the contract. There was a decree for the plaintiff.

The defendants contend that the agreement is an option and time is of its essence. The plaintiff contends it is an agreement for the sale and purchase of real estate and that time is not of the essence of the contract. It is the established rule, both in law and equity, that time is of the essence of an option and if the agreement of the parties was an option, in order to hold the defendants, payment on or before September 1, 1919, was a condition precedent and relief cannot be given the plaintiff. *Smith & Rice Co.* v. *Canady*, 213 Mass. 122. *Boston & Worcester Street Railway* v. *Rose*, 194 Mass. 142. *Carter* v. *Phillips*, 144 Mass. 100. *Trogden* v. *Williams*, 144 N. C. 192.

An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such an agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified. It is merely the right to an election which has been sold and the owner of this right is not bound to complete the sale. *Barnes* v. *Rea*, 219 Penn. St. 287. *Pollock* v. *Brookover*, 60 W. Va. 75. *Smith* v. *Bangham*, 156 Cal. 359.

The contract of May 30, 1919, was signed by the plaintiff and the defendant Forbes acting for himself and his sister. Although it was not stated in express terms that Morgan agreed to buy the premises, the contract was not a mere option binding only upon the defendants, by which they gave the plaintiff merely the right to purchase at his election. It was a bilateral agreement by which Forbes agreed to convey the land, and considering the entire contract, Morgan in fact agreed to purchase it, and both parties were bound by the stipulations of the written contract. It recited that the price was $12,000 and was to be paid by Morgan on or before September 1, 1919; that he has herewith paid

$500 as "bargain money" to be forfeited if he fails to "pay the balance of $11,500 on or before September 1, 1919." "A bargain is a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them." *Hunt* v. *Adams*, 5 Mass. 358, 360. The words "bargain money" have much the same significance as "earnest," which under the statute of frauds is regarded as part payment of the price. *Howe* v. *Hayward*, 108 Mass. 54. We do not decide, however, that the signing by both parties and the use of the words "bargain money" would of themselves be sufficient to require the plaintiff to complete the purchase. See *Benedict* v. *Pincus*, 191 N. Y. 377; *Moran* v. *Standard Oil Co.* 211 N. Y. 187, 197.

In the second paragraph it was agreed that the price to be paid by Morgan was $12,000. If this was an absolute promise to pay, see *Benedict* v. *Pincus*, *supra*, and not merely a promise to pay at his election, or if the whole contract shows it was intended by the parties that his promise to pay the stipulated sum was unconditional, then he was bound to make the purchase and the contract was one of purchase and sale. It was agreed that on the delivery of the deed the plaintiff was "to take over the present insurance on said house, . . . paying *pro rata* for the unexpired portion of the policies and also the cost of Mechanics' Privilege for work contemplated," and in the fifth paragraph he promised "to pay one half the local tax assessed for 1919 on house and land." Even if the contract should be construed to mean that the payment of taxes and insurance depended on his completing the purchase it was further provided that he should supply a caretaker or pay the additional insurance premium if the house became unoccupied. This latter provision was subject to no such condition. He was under the positive obligation to the defendants to pay the insurance or provide a caretaker and they had a right to insist on its performance. He was also given the right after ten days to enter upon the premises and make repairs and alterations and if he failed to complete the bargain, the repairs and alterations were to belong to the estate, free from all charges and mechanics' liens.

In addition to this, in the event of damage or destruction of the house by fire before final payment was made, the insurance recovered was to belong to Morgan, "the same as if the purchase

had been completed." This right to the insurance in case of loss was expressly given him by the contract. It was not intended by this provision of the contract to give the plaintiff, as the holder of a mere option who could decline to purchase the property, the right to recover for the loss or damage to the building a sum which might exceed the price of the option. On the other hand this provision was consistent with a bargain whereby the plaintiff was to buy and the defendants to convey the land. It indicated that the parties contemplated not merely that the defendants were bound, but that both plaintiff and defendants were bound. The plaintiff under the express terms of the contract had the right to enter and take possession of the premises and make repairs, with the full ownership of the insurance received if a loss occurred, and was obliged to provide a caretaker or pay the added premium if the house was unoccupied. Taking into account these positive provisions, and the words used, with all the terms of the contract in mind, as well as its apparent purpose, it was a bilateral contract, the plaintiff and the defendants being under obligation to each other and having their correlative rights. The plaintiff in our opinion gave an absolute promise to pay the agreed price. He was required to make the purchase. The contract therefore was not a mere option, but one of purchase and sale binding on all the parties. *Benedict* v. *Pincus*, *supra*. *Moran* v. *Standard Oil Co.*, *supra*. *Ellis* v. *Bryant*, 120 Ga. 890. *Langert* v. *Ross*, 1 Wash. 250. *Anderson* v. *Wallace Lumber & Manuf. Co.* 30 Wash. 147. *Ives* v. *Hazard*, 4 R. I. 14. *Davis* v. *Martin*, 146 N. C. 281.

The stipulation that the $500 paid when the contract was executed, should be forfeited if Morgan failed to pay the balance on or before September 1, did not affect his right to specific performance. *O'Brien* v. *Boland*, 166 Mass. 481.

It remains to consider whether time was of the essence of the contract. The judge found that there was no extension of time agreed to. The plaintiff did not make the final payment on or before September 1, but a court of equity will relieve against delay in the performance of a contract and enforce specific performance, notwithstanding the failure to perform according to the date assigned, if justice can be done between the parties, and if there is nothing in their express stipulations, the nature of the property, or the surrounding circumstances, which would make

this course inequitable. *Mansfield* v. *Wiles*, 221 Mass. 75. *King* v. *Connors*, 222 Mass. 261. There was evidence that Morgan had entered upon the premises and at considerable expense had made repairs. This circumstance "is ordinarily decisive to entitle him to the favorable interposition of a court of equity, when it does not appear that there has been any other change in the value of the land, when time was not originally of the essence of the contract and has not been made so by notice, and he has been guilty of no laches in applying for relief." *Barnard* v. *Lee*, 97 Mass. 92, 95. The defendant Forbes was absent from the Commonwealth during August and a portion of September in the year 1919. There was evidence that to secure the money for the final payments a mortgage was to be given, and to secure this, repairs were necessary; that during June, July, August and September repairs were made, the application for a loan was made and refused by one bank, and application was made to another bank. The plaintiff also testified that he went to the trust company where the deed was deposited by the defendant Forbes, in response to a telephone message that it was ready, and was told that a temporary delay would be satisfactory. There was other evidence tending to show that the plaintiff did not reasonably expect he would be held to a strict performance of the contract, and that the real objection to making the conveyance was not because of the plaintiff's failure to comply with the time stipulation, but because the defendant Forbes was informed that "he built shabby houses." Taking all the circumstances into account, we think the plaintiff made out his case and that it would be inequitable to refuse him relief.

Decree affirmed.

WILLIAM W. McLEHOSE, executor, *vs.* MALCOLM REID & others.

Bristol. October 25, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Probate Court, New trial of issues. *New Trial. Witness*, To a will. *Will*, Attestation.

Where, before proceeding with the trial of issues for a jury framed on an appeal from a decree of the Probate Court allowing a will, the counsel for the executor explained to the trial judge and the appellant's counsel that one of the attesting witnesses was sick but would be able to attend on the next day, and the appellant went forward with the trial, which continued for three days, without insisting that all of the attesting witnesses be called and without making any request for a ruling on the question of the absence of one of those witnesses or saving any exception to his absence, and the issues were determined against him, the appellant is not entitled as a matter of law to have a new trial granted because of the absence of such witness.

APPEAL from a decree of the Probate Court for the county of Bristol granting a petition, filed on July 15, 1919, for the proof of the will of William Reid, late of Taunton, and allowing the will.

Issues were framed in the Supreme Judicial Court and sent to the Superior Court, where they were tried before *Raymond*, J. The course of the trial, the motion of the appellants for a new trial, and a ruling requested by them upon the hearing of that motion are described in the opinion.

The ruling was refused, the motion was denied, and the appellants alleged exceptions.

N. Lemaire, for the appellants.

S. P. Hall, (*W. S. Woods & E. R. McCormick* with them,) for the executor.

CARROLL, J. The will of William Reid was allowed in the Probate Court. Issues were framed and in the Superior Court the jury found that the testator was of sound and disposing mind and memory when the will was executed and that no fraud or undue influence was practised upon him. Before the trial began the judge was notified that one of the attesting witnesses was sick. On the motion for a new trial the appellants asked the judge to rule

that as matter of law it was necessary, according to our practice, for the executor to call all the attesting witnesses, they being accessible. The case is here on refusal to give this request.

Before proceeding with the trial of the issues, the counsel for the executor explained to the trial judge and the appellants' counsel that one of the witnesses to the will was sick, but would be able to attend on the following day. The trial then proceeded for three days. Even if we assume that all the attesting witnesses should have been called, if accessible, and that the absent witness was in fact able to appear in court and testify, *Chase* v. *Lincoln*, 3 Mass. 236, *Howes* v. *Colburn*, 165 Mass. 385, *O'Connell* v. *Dow*, 182 Mass. 541, 545, the appellants went to trial without insisting that all these witnesses should be called. They made no request for a ruling on this question and no exceptions were taken by them. At the hearing on the motion for a new trial they, for the first time, made the request that it was necessary for the executor to call all the attesting witnesses who were accessible. This point is not now open to them. It could have been raised at the trial and the rule is well settled that a question which could have been raised at the trial is not the subject of exception when presented at the hearing on a motion for a new trial. *Garrity* v. *Higgins*, 177 Mass. 414. *Lopes* v. *Connolly*, 210 Mass. 487, 496.

Exceptions overruled.

ADELARD L. DUBE *vs.* KEOGH STORAGE COMPANY.

Bristol. October 25, 1920. — November 24, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, In use of highway. *Practice, Civil*, Judge's charge.

Where, at the trial of an action of tort for personal injuries received after St. 1914, c. 553, was in effect by a workman, who at fifteen minutes before eight on a morning in February was repairing a spring switch in a street railway track on an ordinarily much travelled city street forty feet wide, and while so at work was run into by a motor truck of the defendant negligently driven, it appeared that, when struck, the plaintiff was on his knees and was engaged in tightening a nut, that he was using a wrench with his right hand and with his left was

holding an iron standard which held a small flag three or four feet above the street, that before kneeling he had looked and had not seen any vehicle, and that while at work he did not look to see if any vehicles were coming or listen for their approach, he testifying, "I couldn't look when I had to tighten up the nut." There was evidence that, after he had been thus at work for two or three minutes, he was struck by the truck which came upon him from in front without any warning signal being given. *Held*, that it could not be ruled as a matter of law that negligence of the plaintiff contributed to his injury.

The instructions given in the charge and a supplemental charge to the jury at the trial above described were held properly to have dealt with requests by the defendant for rulings, that "A person who is working in a place which he knows to be dangerous by reason of the traffic or other causes is bound to exercise his own faculties to insure his own safety and his failure to do so is negligence," and that "A person is not justified in relying wholly upon statutory signals which ought to be given by others but is bound to use his eyes and ears reasonably to ascertain whether or not a vehicle is approaching and failure to do so is negligence."

TORT for personal injuries received on February 27, 1919, when the plaintiff, while engaged in repairing a spring switch of the street railway on Pleasant Street near the corner of Fourth Street in the city of Fall River, was run into by a motor truck of the defendant. Writ dated March 5, 1919.

In the Superior Court the action was tried before *Raymond*, J. Material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked for rulings, among which were the following:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. The plaintiff's own story of his own conduct just prior to the accident shows he was guilty of contributory negligence and the verdict must be for the defendant."

"5. A person who is working in a place which he knows to be dangerous by reason of the traffic or other causes is bound to exercise his own faculties to insure his own safety and his failure to do so is negligence.

"6. A person is not justified in relying wholly upon statutory signals which ought to be given by others but is bound to use his eyes and ears reasonably to ascertain whether or not a vehicle is approaching and failure to do so is negligence."

The rulings numbered one and two were refused.

On the subject of the fifth and sixth rulings requested, the judge in his charge instructed the jury in substance as follows:

He asked the jury to determine whether the plaintiff acted "as an ordinarily careful man would act in looking out for his own safety. Did he do anything? There is testimony he looked up and down the street and saw the street was clear, and that he did maintain the flag. Now, what else would you have done, what else would an ordinarily careful man have done with this work on hand to carry out? If you say an ordinarily careful man would have done something different from what he did, then his failure in that respect would be negligence on his part. Negligence means failure to do something that an ordinary, reasonably careful man would have done under the circumstances. . . .

"He had a right to presume that people would use the street with reasonable regard to the safety of other folks on the street, reasonable regard to his own safety; that a man coming down with an automobile, or milk wagon as that has been mentioned, or wheelbarrow, or anything else would use the streets in a proper way, that is, with reasonable regard to the rights of other persons who were rightly on the street, and he was rightly on the street. He had a right to presume that. . . .

"He had a right to presume that travelers like this defendant coming down that street would give the ordinary signals and do the ordinary things that reasonably careful men would do in obedience to the law and in obedience to the dictates of humanity and common sense and prudence.

"Now, doing what he was doing, with the right to presume what he had a right to presume with reference to other people acting properly, with the flag elevated, and with all the conditions as they existed then, do you think that he was careless? That is for you."

At the close of the charge, the fifth and sixth rulings requested having been called again to the judge's attention, he further charged the jury as follows as to the fifth ruling:

"I will not give it in that form, but I think I covered it sufficiently in my charge. I will say that a person who is working in a place which he knows to be dangerous, by reason of the traffic or other causes, is bound to do what a reasonably careful man would do under the circumstances. I would not say that a man working in a place like this would be negligent if he took his eyes off of the road over which this truck came, used his

faculties in that way, because it may be necessary in the work he is doing to use his eyes on that work. You may say this was such work that he ought to have bent his energies and his faculties on this work, and you may say that the fact that he kept the flag flying, that you say that he ought to keep the flag up, was as much as the ordinarily careful man would do.

"That is the standard, the care of the ordinarily careful man under the circumstances, taking everything into consideration. That very often does involve, of course, the exercise of all his faculties, but sometimes his faculties are called upon by him to do other things, and it is for you to say in this case whether, knowing what he did, he did what the ordinarily careful man would do under like circumstances."

As to the subject matter of the sixth ruling, the judge further charged the jury in substance as follows:

"A person is not justified in relying wholly upon statutory signals which ought to be given by others, that is, like the tooting of the horn before the automobile approached the corner. That is a good principle of law . . . but it is for you to say whether this man did trust wholly to the precautionary signals of the truck, or whether he did something of himself to announce his presence, to warn people that somebody was there and must be looked out for. . . . I do not go that far in this case [that is, as far as the sixth ruling asked for]: I leave that to you to say whether what this man actually did—he said, as I understood, that he did not look while he was bent over there, he did not look to see whether an automobile was coming, and he did not listen, because his attention was engrossed in what he was doing. I think that is practically the testimony, but you will recall what the testimony was. I leave the whole question to you to say whether he did what a reasonably careful man would do under the circumstances, and the place, and time, and where he was."

The jury found for the plaintiff in the sum of $9,000; and the defendant alleged exceptions.

The case was submitted on briefs.

H. F. Hathaway, for the defendant.

D. R. Radovsky, for the plaintiff.

JENNEY, J. Adelard L. Dube on February 27, 1919, shortly before eight o'clock on a "clear and cold" morning, was seriously

injured by a motor truck belonging to the Keogh Storage Company and then being used in its business.

The main question is as to the due care of the plaintiff. There was evidence tending to show the following facts: The plaintiff, who was employed by a street railway company which had tracks on Pleasant Street in Fall River, went to the scene of the accident to repair a spring switch connected with the tracks. The switch was located on that street near the corner of Fourth Street. Pleasant Street was forty feet wide and ordinarily much travelled. The plaintiff was alone, upon his knees, facing the west, engaged in tightening a nut in the switch box, using a wrench with his right hand to do the work and holding in his left hand an iron standard with a small flag thereon, which standard extended about three or four feet above the level of the street. As he knelt he looked and did not see any vehicle. He had been in this position about two or three minutes, when he "heard a yell" and was hit by the truck. While at work, he did not look to see if any vehicles were coming, or listen for their approach. He testified, "I couldn't look when I had to tighten up the nut." At the time of the accident, there was no other vehicle near by. The defendant's truck came on Pleasant Street from the west operated at a speed of about fifteen miles an hour. No signal or warning of its approach was given. The driver did not see the plaintiff before the truck hit him.

The evidence justified the submission of the plaintiff's due care to the jury. He was rightfully upon the way. The fact that while engaged in his work, he did not continue to look or listen, was not decisive against him. The case is within the authority of *Goodfellow* v. *Boston, Hartford & Erie Railroad*, 106 Mass. 461, *Hanley* v. *Boston Elevated Railway*, 201 Mass. 55, and *Burns* v. *Oliver Whyte Co. Inc.* 231 Mass. 519. Although it was the duty of the plaintiff to exercise the care of a reasonably prudent person under all the circumstances, he could rely to some extent on the assumption that the driver of the truck would exercise some care to avoid hitting him. *Scanlon* v. *Berkshire Street Railway*, 215 Mass. 554. *Gagnon* v. *Worcester Consolidated Street Railway*, 231 Mass. 160. *Bombard* v. *Worcester Consolidated Street Railway*, 234 Mass. 1. The defendant relies upon *Quinn* v. *Boston Elevated Railway*, 188 Mass. 473, *Kelly* v. *Boston Elevated Rail-*

way, 197 Mass. 420, *Carney* v. *Boston Elevated Railway*, 219 Mass. 552, and *Dwyer* v. *Boston Elevated Railway*, 220 Mass. 193. These cases are distinguishable from that under consideration, because the plaintiffs therein knew that their positions were those of undoubted danger, and took no precaution to prevent the receipt of injury.

The defendant does not claim that the evidence did not justify the jury in finding that the operator of the truck was negligent.

The exceptions to the denial of the motion that a verdict be ordered for the defendant, and to the refusal to give its first and second requests for rulings must be overruled.

There remains for consideration only the exception "to so much of the charge pertaining to requests 5 and 6 as was not given in form or substance." Considering this exception broadly, and as not limited to the charge, we think there was no reversible error. The instructions given, taken as a whole, correctly covered the subjects referred to in these requests, so far as they were pertinent to the case on trial.

Exceptions overruled.

EDWIN E. GRAVES'S CASE.

(Two petitions.)

Suffolk. November 8, 1920. — November 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Extradition. Department of Public Safety, Division of State Police. *Habeas Corpus. Jury and Jurors.*

A warrant, issued by the Governor of this Commonwealth on a demand by the Governor of the State of Illinois for the extradition of one indicted by the grand jury of that State, and directed to "The Sheriffs, Deputy Sheriffs, Division of State Police Department of Public Safety, and other officers of and in the several cities and counties of this Commonwealth," cannot lawfully be served by an officer of the division of State police, department of public safety, he not being an officer designated in the warrant and the "division" not being an officer or a class of officers.

It is an essential element of a warrant for an arrest in a criminal case that it be directed to some officer or class of officers and not to a department, an organization, or an official or unofficial body.

The mere fact that, at the time of the arrest upon a warrant issued by the Governor of this Commonwealth on a demand by the Governor of the State of Illinois for the extradition of one indicted by a grand jury of that State, the person arrested was at large in the custody of bail furnished for his release from custody under a previous extradition warrant based on an earlier indictment of a grand jury of the State of Illinois, did not invalidate the later arrest.

Formal objections to an indictment found and returned by a grand jury of the State of Illinois are not grounds for the issuance of a writ of habeas corpus upon a petition filed in this Commonwealth by the defendant named in that indictment after his arrest under the authority of a warrant of the Governor of this Commonwealth issued upon a demand by the Governor of the State of Illinois for his extradition.

The Governor of this Commonwealth, in determining the propriety of issuing a warrant under St. 1920, c. 399, when a demand is made upon him by a Governor of another State under R. L. c. 217, § 11, for the extradition of a fugitive from justice, may consider evidence outside the papers sent with the requisition.

A petitioner for the writ of habeas corpus has no right to a trial by jury of facts placed in issue by the pleadings.

A warrant issued by the Governor of this Commonwealth under St. 1920, c. 399, upon a demand by a Governor of a sister State made under R. L. c. 217, § 11, for the arrest and rendition of a fugitive from justice under indictment in that State, is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled.

TWO PETITIONS, filed respectively on May 13, 1920, and on August 5, 1920, each for the writ of habeas corpus directing the production before the court of Edwin E. Graves from the custody of "Arthur E. Keating, a member of the Division of State Police, Department of Public Safety" of the Commonwealth.

The respondent having made a return and the petitioner having traversed the allegations of the return and having moved for a trial by jury, the first petition was heard by *Pierce*, J., the motion for a trial by jury having been denied, and the single justice ruled that the petition should be dismissed "and the petitioner should be remanded to the custody of said Keating," and reported the case to the full court for determination.

Upon the completion of the pleadings in the second case, the petitioner moved for a trial by jury, and the motion was denied by *Braley*, J., who then heard the case upon its merits, "admitted the petitioner to bail" and reserved the case for determination by the full court upon the record and certain findings of fact.

Material facts found by the single justices are described in the opinion.

By order of *Braley*, J., the two cases were consolidated for argument before the full court.

Sections 11 and 12 of R. L. c. 217, and § 13 as amended by St. 1920, c. 399, are as follows:

"Section 11. The Governor, in any case which is authorized by the Constitution and laws of the United States, may, upon demand, deliver to the executive of any other State or territory any person charged therein with treason, felony or other crime; or may, upon application, appoint an agent to demand of the executive authority of any other State or territory any such offender fleeing from the justice of this Commonwealth. Such demand or application shall be accompanied by sworn evidence that the person charged is a fugitive from justice and by a duly attested copy of an indictment or complaint made before a court or magistrate authorized to receive it. Such complaint shall be accompanied by affidavits to the facts constituting the crime charged by persons who have actual knowledge thereof, and by such further evidence as the Governor may require.

"Section 12. Upon such demand or application, the attorney general or a district attorney shall, if the Governor so requires, forthwith investigate the grounds thereof and report to the Governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case, and, in case of a person demanded, whether he is held in custody or is under recognizance to answer for a crime against the laws of this Commonwealth or of the United States or by force of any civil process, with an opinion as to the legality or expediency of complying therewith.

"Section 13. If the Governor is satisfied that the demand conforms to law and ought to be complied with, he shall issue his warrant under the seal of the Commonwealth to an officer authorized to serve warrants in criminal cases, directing him to arrest and deliver such person to the agent making the demand, and shall also, by the warrant, request such officers within this State to afford all needful assistance in the execution thereof."

F. W. Mansfield & E. R. Mansfield, for the petitioner, submitted a brief.

M. C. Teall, Assistant Attorney General, (*J. W. Corcoran* with him,) for the respondent.

RUGG, C. J. These are two petitions, each for the writ of habeas corpus. The petitioner asks release from arrest by an officer of the Division of State Police, Department of Public Safety, upon two warrants, issued by the Governor of this Commonwealth on demand of the Governor of the State of Illinois, for his extradition to answer to indictments found by a grand jury in the latter State.

1. The warrant on which the petitioner was arrested in the first case was directed "To The Sheriffs, Deputy Sheriffs, Division of State Police Department of Public Safety, and other officers of and in the several cities and counties of this Commonwealth." The petition alleges and the answer and return admit that the arrest was made by Arthur E. Keating, an officer of the Division of State Police, Department of Public Safety of the Commonwealth. See St. 1919, c. 350, Part I, § 1; Part III, §§ 100, 101, 102, 108, 110. So far as shown by the record that was his only authority to make the arrest. He did not come within any other of the classes of officers named in the warrant of the Governor. He cannot justify unless the direction of the warrant to "Division of State Police, Department of Public Safety" empowered him to make the arrest. It is provided by R. L. c. 217, § 13, unchanged in this particular by St. 1920, c. 399, that when satisfied the demand by the executive of a sister State conforms to law and ought to be complied with, the Governor "shall issue his warrant under the seal of the Commonwealth to an officer authorized to serve warrants in criminal cases," to take, that is, to arrest the person demanded.

Plainly the warrant in the first case does not conform to this statute. The "Division of State Police, Department of Public Safety" is not an officer. It is the name of an administrative agency connected with the executive department of government. It is composed not only of officers authorized to serve warrants in criminal cases but also of such "inspectors, experts, clerks and other assistants" as may be provided by law. St. 1919, c. 350, Part III, § 101. It is an essential element of a warrant for an arrest in a criminal case that it be directed to some officer or class of officers and not to a department, organization or official or unofficial body. *Commonwealth* v. *Foster*, 1 Mass. 488. The phrase of the statute is explicit to that effect. The words of the warrant in the case at bar "Division of State Police, Department of

Public Safety" do not conform to this general principle or to the requirement of the statute. Since the officer making the arrest did not hold any of the offices named in the warrant he had no authority of law for making the arrest. This point is alleged in the petition, was made at the trial before the single justice and is reported for our consideration. It follows that, in the first case, without considering the other points raised, the petitioner is entitled to his discharge.

2. The petitioner was admitted to bail on the first case, and the questions of law therein raised were reported by the single justice.

While that case was pending but before it was reached for hearing by the full court, the petitioner was arrested upon another warrant issued by the Governor of this Commonwealth in response to the demand of the Governor of the State of Illinois for extradition of Graves to answer to an indictment found by the grand jury of the latter State. It was said by Chief Justice Gray in *Davis's Case*, 122 Mass. 324, at page 328: "The warrant of the Governor of the Commonwealth is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled."

The fact that the petitioner was at large on bail under these circumstances did not in itself prevent a valid arrest on a second executive warrant in accordance with a new requisition upon a fresh indictment. The duty of the Governor under the Constitution of the United States, art. 4, § 2, to deliver up a person charged with crime in another State, upon proper demand by the executive authority of the State from which he has fled, is imperative in every case in which it arises. *Biddinger* v. *Commissioner of Police*, 245 U. S. 128. This principle has no application to instances where the fugitive is held to answer for crime in this Commonwealth. *Opinion of the Justices*, 201 Mass. 609, 610. The petitioner was not held for crime in this Commonwealth. He was not in the custody of the court but at large in the custody of the bail. *Commonwealth* v. *Brickett*, 8 Pick. 138, 140. It was no interference by the executive with the judicial department of government, if under the circumstances here disclosed the Governor

chose to issue a second warrant. It may be that the proceedings of indictment, requisition and issuance of executive warrant in the second case were for the purpose of overcoming defects in the first. Such proceedings contravened no rights of the petitioner. *Commonwealth* v. *Hall*, 9 Gray, 262. *Ex parte Milburn*, 9 Pet. 704. *Bassing* v. *Cady*, 208 U. S. 386. *Taylor* v. *Taintor*, 16 Wall. 366.

Formal objections are raised concerning the indictment. These, however, are for the consideration of the courts of the State in which the indictment was found and not for this court on a petition for habeas corpus. *Davis's Case*, 122 Mass. 324, 329.

There is no reason to doubt the sufficiency of the papers in the second case. The indictment, copy of which accompanies the requisition, in one count charged the defendant and others with conspiring to injure and destroy large numbers of buildings, the property of divers persons, by explosion of dynamite, and in the second count with conspiracy to injure and destroy a specified building of a named owner by explosion of dynamite.

The indictment charges acts manifestly constituting a crime at common law. It appears to be a crime under the statutes of the State of Illinois. It is certified to be a crime under the laws of that State in the requisition of its Governor.

The sworn affidavits accompanying the requisition were sufficient to show that the petitioner was a fugitive from justice. *Duddy's Case*, 219 Mass. 548. *Strassheim* v. *Daily*, 221 U. S. 280.

The Governor might consider additional affidavits. It is provided by R. L. c. 217, § 12, that the Governor may require the Attorney General to investigate the demand for requisition and report all material facts which shall come to his knowledge. It is within the clear contemplation of this provision that the Governor may consider evidence outside the papers sent with the requisition.

Several objections are urged to the authenticity of the papers for requisition presented to the Governor. Without reviewing these one by one, it is enough to say that no sound reason to doubt their genuineness, accuracy or sufficiency is apparent on the record.

Trial by jury in habeas corpus has never been allowed in this Commonwealth, so far as we are aware. Such proceeding would

be contrary to the essential nature of that writ, which is to determine forthwith the right of a person to his liberty. The great weight of authority is against the allowance of such trial. *Orr* v. *Miller*, 98 Ind. 436. *Turner* v. *Hendryx*, 86 Ore. 590, 605. *Pittman* v. *Byars*, 51 Tex. Civ. App. 83. The motion for a trial by jury was denied rightly.

The warrant issued by the Governor in the second case is not open to the objection held fatal to that in the first case: it conforms to the requirement of the statute and is proper in form. It is directed, among others, to any officer of the State police of the division of public safety.

The petitioner fails to overcome the *prima facie* case made out by the decision of the Governor or to show that on any ground he is entitled to be discharged.

The printed record considered alone in parts seems to indicate that each case was heard upon the petition and a rule issued to the arresting officer to show cause why the writ should not issue. If that were the procedure the proper entry in the first case would be, writ to issue and upon its return petitioner to be discharged, and in the second case, petition denied or dismissed. But the copies of papers transmitted to the full court as required by law show that the writ of habeas corpus issued and the petitioner was admitted to bail in each case. It is apparent, therefore, that hearing was had partly on the petition and partly on the return of the writ, or wholly on the return of the writ, either procedure being proper. *Chambers's Case*, 221 Mass. 178. Therefore, in the first case the entry may be, petitioner to be discharged, and in the second case, petitioner remanded to custody under the warrant of the Governor for rendition to the agent of the Governor of the State of Illinois.

So ordered.

In re Albert H. de Propper, petitioner.

Suffolk. October 18, 1920. — November 27, 1920.

Present: Rugg, C. J., De Courcy, Crosby, Carroll, & Jenney, JJ.

Attorney at Law, Petition for admission or reinstatement. *Practice, Civil*, Appeal, Expunging of scandalous and impertinent matter from the record. *Clerk of Courts. Superior Court.*

A proceeding by an attorney at law for admission to the bar is a proceeding at law and not in equity.

The record upon an appeal from the denial of a petition for the admission or reinstatement of an attorney at law as a member of the bar should include no part of the evidence introduced at the hearing of the petition.

A record, which merely shows a dismissal, after a hearing, of a petition for the admission or reinstatement of an attorney at law as a member of the bar and an appeal therefrom, discloses no error of law.

The duty of preparing the copies of papers and the records of cases brought to this court by appeal or upon exceptions, reports or reservations, is placed by R. L. c. 157, § 21; c. 173, § 117, directly, unequivocally and exclusively upon the clerk; and the Superior Court has no jurisdiction or power to order that an appellant be allowed to take the files of a case and to have them printed under his own direction, and to permit printing by multigraph or other duplicating machine.

Certain impertinent and scandalous matter, appended to a record filed in this court after the certificate of the clerk of the court, was ordered expunged.

Petition, filed in the Superior Court on July 10, 1919, for admission or reinstatement as a member of the bar of the Commonwealth.

Notice of the petition was ordered served upon the chairman of the board of bar examiners and upon the president and the secretary of the Bar Association of the City of Boston, and answers were filed in behalf of that bar association and of the board of bar examiners. The petitioner filed a document entitled "The Replication."

The petition was heard by *Wait*, J., and was dismissed. The petitioner appealed.

The case was submitted on briefs.

A. H. de Propper, pro se.

J. B. Studley, for the respondents.

RUGG, C. J. This is a petition for admission or reinstatement to practise law. It was heard by a judge of the Superior Court and by him denied and ordered dismissed. The petitioner appealed.

A petition for admission to the bar is a proceeding at law and not in equity. *Boston Bar Association* v. *Greenhood*, 168 Mass. 169, 182. *Boston Bar Association* v. *Casey*, 227 Mass. 46, 51. An appeal in a case at law brings before this court for examination only errors of law apparent on the record. It does not bring up the evidence for review. *Given* v. *Johnson*, 213 Mass. 251. The material part of the record consists of the petition, answer, replication, although the latter was unnecessary and might have been stricken from the record, *Comstock* v. *Livingston*, 210 Mass. 581, and the order. No error of law is disclosed on this record. It does not appear that the decision of the judge was founded upon matter of law. It seems to have been based wholly on the facts as he found them and on his inferences therefrom. *Cochrane* v. *Boston*, 1 Allen, 480. *Knowles* v. *Bachelder*, 106 Mass. 343. A simple finding of fact discloses no error of law and cannot be revised on appeal. It must be accepted as true. This court in actions at law cannot weigh evidence or review findings of fact. *Atlantic Maritime Co.* v. *Gloucester*, 228 Mass. 519, 522, and cases there collected. It is settled that the judge was not bound to make written findings of fact. His duty was fully performed by passing upon questions of law presented and by deciding the case. *Lowell* v. *Bickford*, 201 Mass. 543, 545. *Davis* v. *Boston Elevated Railway*, 235 Mass. 482, 494, 495, and cases there collected.

There is appended to the record what appears to be a report of the trial in the Superior Court, including the evidence. This is no part of the record and cannot be brought before this court on appeal. *Hicks* v. *Graves*, 194 Mass. 589. *Moran* v. *Murphy*, 230 Mass. 5. *Norton* v. *Musterole Co.* 235 Mass. 587. It may be added, however, that a careful examination has been made of all papers presented. Sedulous care appears to have been exercised throughout that the petitioner have a full and fair hearing. The judge of his own motion saved for the petitioner exceptions to the admission of the record of the Supreme Judicial Court upon an earlier petition for admission to the bar, wherein it was found that the petitioner was not of good moral character, and to the

admission of the record of the disbarment of the petitioner in *People* v. *Propper*, 220 Ill. 455. Manifestly this evidence was competent. There is no error prejudicial to the petitioner.

There are irregularities in the preparation of the case for presentation to this court. They are all in the nature of concessions to the petitioner and in his interests and in no degree harmful to him. They concern proper practice, however, and cannot be passed by.

Among the papers presented is a typewritten copy of an order of the Superior Court authorizing the clerk to permit the petitioner to take the files "for the purpose of having them printed in the prosecution of the appeal claimed by him herein; and further to permit printing by multigraph or other duplicating machine." The physical appearance of the papers bears indication that they have been prepared in accordance with this order. Immediately following this is another typewritten sheet in form a certificate signed by the clerk of the Superior Court, the substance of which is this: "The mechanical make up of the within appeal was not done under the supervision of the clerk of this court. By order of the court, a copy of which is hereto annexed, the petitioner de Propper was allowed to take the files in this case and have them printed under his own direction. The clerk, therefore, attests the record and declines responsibility for the mechanical make up of the appeal." This order and certificate were irregular and unwarranted by law. It is provided in R. L. c. 157, which relates to the Superior Court, by § 21, that "The clerk shall, at the expense of the appellant or excepting party, or of the plaintiff upon a case reserved or reported . . . prepare and transmit to the Supreme Judicial Court . . . one copy of every paper on file in the case, except papers used as evidence only, and of all papers made part of the case or referred to in the bill of exceptions or report, or so much thereof as is necessary fully to present the question of law, for the use of the Chief Justice, and a like copy for the clerk of the Supreme Judicial Court . . . ; and one copy of the bill of exceptions, report or papers upon which the question of law arises on appeal for each associate justice, for each party and for the reporter of decisions. . . ." It also is provided by R. L. c. 173, § 117, that "Copies and papers relating to a question of law arising in the Supreme Judicial Court or the Superior

Court upon appeal, exception, reservation, report or otherwise shall be prepared by the clerk of the court" and transmitted for the use of the full court. The words of both these sections are plain. Their meaning is not open to doubt. The duty of preparing the copies and the record of cases for the Supreme Judicial Court is placed directly, unequivocally and exclusively upon the clerk. From its performance he cannot be relieved. The purpose of the Legislature is manifest. Its wisdom is not open to question. The order of the Superior Court also was contrary to General Rule, Section 15,* as to records of the Supreme Judicial Court and the Superior Court established pursuant to St. 1917, c. 206.

Subsequent to the certificate of the clerk above referred to, but attached thereto, are two printed pamphlets purporting to have been prepared by the petitioner at some earlier time or times, and many pages having the appearance of a report of testimony and evidence submitted to the Superior Court judge at the hearing. None of these are certified by the clerk. None of them are a part of the record. They are not attested. Even if they were, they would be no proper part of the record upon such an appeal as this, as already has been pointed out. It does not appear of record by whose instrumentality they were attached to the pages attested by the clerk. The pamphlets contain impertinent and scandalous matter. These are ordered expunged. *Washington Post Co.* v. *Chaloner*, 250 U. S. 290, 294. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 391. The order dismissing the petition is affirmed.

So ordered.

* This rule is as follows: "The dockets, files, and extended records of the court are to be kept in the clerk's office or in the custody of the clerk, and he is to be strictly responsible for them. They shall not be taken from his custody except in cases authorized by statute and except for use by a justice of the court; but the parties may at all times have copies; provided, however, that the clerk may permit papers from the files in pending criminal cases to be taken temporarily by the district attorney for his district. Common-law rule XXXIII of the Supreme Judicial Court is hereby abrogated."

MECHANICS FOUNDRY AND MACHINE COMPANY *vs.* JOHN LYNCH & others.

Bristol. October 25, 1920. — November 27, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Labor. Strike. Equity Jurisdiction, To enjoin strike.

A strike of workmen which is for the sole object of compelling the employer to re-employ a discharged fellow workman of the strikers is a strike for an unlawful purpose, and it will be enjoined in a suit in equity by the employer against the strikers, even if no illegal means are employed to carry it into effect.

BILL IN EQUITY, filed in the Superior Court on March 13, 1920, against four officers and twenty-six other members of the International Moulders' Union No. 48, who on March 2, 1920, were employed by the plaintiff, to enjoin a strike.

The suit was referred to a master. Material findings of the master are described in the opinion. The master's report was confirmed and a final decree was entered, reciting that the defendants "struck, in order to compel the plaintiff to reinstate a fellow workman [Cornelius Lynch] who had been discharged. Said strike was unlawful. On the seventeenth day of March, said Moulders' Union voted to request the International Board to declare the plaintiff's shop closed to union men. By that act, they threatened to ratify said unlawful strike and to continue it." The decree ordered that the union, "its officers, members and agents, be perpetually enjoined from combining and conspiring to compel the plaintiff to take Cornelius Lynch back into its employ; from ratifying the present strike; from entering into any strike for the purpose of compelling the plaintiff to take back Lynch; from declaring or seeking to have declared the plaintiff's shop closed to union men in aid of such a strike or such a purpose; and from seeking in furtherance of such a strike to prevent by persuasion, coercion or intimidation other workmen, whether union men or non-union men, from entering or continuing in the plaintiff's employ." The defendants appealed.

The case was submitted on briefs.

E. Higginson, for the defendants.

A. S. Phillips, for the plaintiff.

CARROLL, J. The master found that thirty employees of the plaintiff, named in the second paragraph of his report, refused to work and struck. On February 20 and 21, there was a discussion between the plaintiff's manager and the employees concerning shop conditions, in which discussion Cornelius Lynch, an employee, took an important part. He also found that Lynch and the manager "became personal." The shop conditions were satisfactorily adjusted and all the employees except Lynch returned to work on February 23. On March 2, when Lynch came to the foundry, he was discharged "because of his attitude on February 20 and 21;" and thereupon the defendants struck because Lynch was not given employment. There has been no "picketing, boycotting or other acts or proceedings, other than that the moulders employed by the plaintiff remained away from their work." The bill was brought to restrain the defendants from continuing the strike, to prevent them from interfering with the plaintiff's business and its employees, and from paying money to the apprentices in the plaintiff's employ, or to any other person, as an inducement to remain out, or to quit the plaintiff's employment. A decree was entered in favor of the plaintiff. The form of the decree is not questioned and we do not consider it. The only issue before us on this appeal is whether a strike to compel the plaintiff to employ a discharged workman is a lawful strike.

Every person has a legal right to dispose of his own labor as he wishes, and to work for whom he pleases. He may refuse to work with another because that person is distasteful to him, or for any other reason. *Plant* v. *Woods*, 176 Mass. 492, 498. *Pickett* v. *Walsh*, 192 Mass. 572, 582. The employer also has a right freely to contract, the right to select his employees, and to decide when to engage and discharge them. *L. D. Willcutt & Sons Co.* v. *Driscoll*, 200 Mass. 110, 118. *Vegelahn* v. *Guntner*, 167 Mass. 92, 97. *Haverhill Strand Theatre, Inc.* v. *Gillen*, 229 Mass. 413.

In *Coppage* v. *Kansas*, 236 U. S. 1, and *Adair* v. *United States*, 208 U. S. 161, it was held that neither Congress nor the States could interfere with the liberty of contract and penalize an em-

ployer for threatening an employee with the loss of employment because of his membership in a labor organization, or punish an employer for requiring his employees to agree not to become members of such an organization as a condition of securing or retaining employment. (See R. L. c. 106, § 12.) A combination of men to close the employment to all but members of certain organizations is unlawful and can be restrained. *Cornellier* v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554. If for any reason the employer sees fit to discharge an employee, he has that right and it cannot be taken away from him.

While the individual employee may refuse for any cause to continue in the plaintiff's service, the defendants could not conspire and combine to quit and enforce a strike because the plaintiff refused employment to a fellow workman. The plaintiff had the right in law to do what he did, and the combination of employees to bring about a strike for the cause alleged, is unlawful in the end it sought, even if no illegal means were used to carry it into effect. *Pickett* v. *Walsh, supra. Martell* v. *White*, 185 Mass. 255. In *DeMinico* v. *Craig*, 207 Mass. 593, it was decided that a strike to get rid of a foreman because some of the employees had a dislike for him, was not a strike for a legal purpose. A strike because a fellow workman is discharged stands on the same ground and is governed by the same principle, and while a body of men may lawfully strike to better their conditions, the mere refusal to continue the employment of one of their number is not such a condition as to justify them in combining to enforce a strike. *DeMinico* v. *Craig, supra.*

When Lynch was discharged there was no dispute about wages or hours of labor, the dispute concerning working conditions had been settled to the satisfaction of all the parties; and the only reason for the strike was the discharge of Lynch and the refusal to employ him. As the strike was for an unlawful purpose, it was properly restrained.

Decree affirmed.

MARY A. O'BRIEN *vs.* LAWRENCE J. LOGAN & others.

Suffolk. October 21, 1920. — November 29, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Election. Mortgage, Foreclosure, Redemption. *Equity Jurisdiction*, Retention of suit for assessment of damages.

A suit in equity, begun in May, 1907, to have a foreclosure of a second mortgage upon real estate of the plaintiff declared invalid, the plaintiff given a right to redeem, and "that the plaintiff may be awarded damages . . . for the injuries done her by the defendant," was referred to a master, and, upon facts found by him, an interlocutory decree was entered in October, 1908, adjudging that the plaintiff was entitled to redeem from the second mortgage by paying the amount due upon the mortgage note and again referring the case to the master for the determination of that amount. The plaintiff at the time of the sale had known that it was to take place and knew the balance due on the mortgage note. In December, 1908, the first mortgage was foreclosed by sale under a power of sale therein and the property was sold to one who had represented the second mortgagee in the proceedings in foreclosure of that mortgage, but who at the sale in foreclosure of the first mortage purchased in his individual behalf. In December, 1915, a motion by the plaintiff to have the master's report confirmed was allowed, at her request, as of October, 1908. A final decree was entered in 1920 directing the payment to the plaintiff of any balance left in the hands of the first mortgagee after satisfaction of the provisions of the first and second mortgages. The plaintiff appealed and contended that she should be given relief in damages. *Held*, that

(1) The plaintiff was not entitled to a decree awarding her both redemption from the second mortgage and damages because of its wrongful foreclosure;

(2) The plaintiff had elected to waive damages and rely on her right to redemption;

(3) The foreclosure of the first mortgage did not give the plaintiff a right to abandon the remedy which she previously had elected to pursue and to have relief by damages.

BILL IN EQUITY, filed in the Superior Court on May 7, 1907, and afterwards amended, as stated in the opinion, for redemption of certain property on Bowdoin Street in Boston from a second mortgage held by the defendant Lawrence J. Logan, the plaintiff alleging that the property had been sold and conveyed to the defendant John A. Coveney at a sale purporting to be in foreclosure of that mortgage, and that the sale should be declared void. There also were prayers for an accounting, "that the plaintiff may be awarded damages against the defendant Logan for the injuries done her by the defendant," and for general relief.

The suit was heard twice by masters. Findings of the masters are described in the opinion. An interlocutory decree was entered on October 31, 1908, by order of *Wait*, J., confirming the report of the first master, and directing that the suit again be referred to him to assess the amount due the defendant Logan on the second mortgage.

After a hearing by *Lawton*, J., the report of the second master was confirmed, and a final decree was entered on January 22, 1920, directing the Columbian Life Insurance Company to pay to the defendant Lawrence J. Logan $3,693 with interest, and to pay to the plaintiff the balance of the amount which it had received at the sale in foreclosure of the first mortgage. The plaintiff appealed.

H. B. Ehrmann, for the plaintiff.

J. E. Hannigan, for the defendants.

CROSBY, J. This is a bill brought to set aside a foreclosure sale under a power in a junior mortgage and for an accounting, with a prayer for alternative relief as follows: "Or that the plaintiff may be awarded damages against the defendant Logan for the injuries done her by the defendant." The bill was filed on May 7, 1907. The original plaintiff having died since the filing of the bill, her heirs and the administrators of her estate have been made parties plaintiff. By amendment, Edward L. Logan, Thomas McCormick, and the Columbian National Life Insurance Company have also been added as parties defendant. The defendant Lawrence J. Logan will hereafter be referred to as the defendant, and the Columbian National Life Insurance Company as the Company. We do not deem it necessary to refer to all of the many docket entries and proceedings during the past thirteen years.

On October 10, 1905, the plaintiff, being the owner of two double apartment houses and land appurtenant thereto, which houses were regarded as four buildings, gave to the Company four first mortgages on the property for a total of $18,000, and to the defendant a second mortgage on the property for $2,250. The defendant commenced proceedings for the foreclosure of his mortgage, under the power of sale therein contained, for a breach of its conditions. The sale was advertised to take place on April 29, 1907, at ten o'clock in the forenoon; it was twice postponed, and on May 2, 1907, it took place and the property was purchased by

one Coveney, who was the highest bidder, and who acted in the interest of the defendant. On May 7, 1907, the plaintiff's bill was filed. On May 7, 1908, she was allowed to amend her bill by joining Edward L. Logan as a defendant, by alleging, among other things, that the sale under the second mortgage by the defendant was void, and by praying that she be awarded damages against Edward L. Logan for the injury sustained by reason of the alleged foreclosure proceedings. The case was referred to Stephen H. Tyng, Esquire, as master, who found that while there was no real intention on the part of Edward L. Logan, who represented the defendant in the foreclosure proceedings, to act otherwise than in good faith, nevertheless the sale was not conducted with a reasonable regard for the rights of the mortgagor. The master's report was filed on September 20, 1908. Thereafter on October 31, 1908, an interlocutory decree was entered overruling the defendant's exceptions to the master's report, confirming the report, and decreeing that the plaintiff was entitled to redeem by paying the amount due on the mortgage, and referring the case back to the master to determine that amount.

The record shows that on December 24, 1908, the Company as first mortgagee, there having been a default in the condition of the mortgages held by it, foreclosed them under the power of sale, and the property was sold to Edward L. Logan for $22,850, leaving a surplus of $3,773.03 in the hands of the Company. A second amendment to the bill was allowed on January 22, 1909, and was dismissed on demurrer on July 17, 1919, but without prejudice to the plaintiff's rights otherwise acquired against the defendants. Mr. Tyng having died, the case was referred to another master, "to take an accounting between the parties and to ascertain [1] the amount due the defendant Lawrence J. Logan under his mortgage, . . . [2] the value of the property described in the plaintiff's bill as of the date of the foreclosure of said mortgage . . . [3] the damages suffered by the plaintiff by reason of the wrongful foreclosure of said mortgage . . . and [to] report his findings to the court, together with such facts and questions of law as either party may request." The master filed a report which was recommitted to enable the defendant to present testimony as to the value of the real estate, and also to take the testimony of Edward L. Logan, who was absent from the country in the military

service of the government at the time of the first hearing before the master. After the master had filed his final report, the case was heard on motions of the plaintiff to recommit and discharge the report, and upon the exceptions thereto. An interlocutory decree was entered overruling the motions and exceptions and confirming the report. A final decree has been entered and the case is before us on the plaintiff's appeal from that decree.

The grounds upon which the plaintiff bases her claim for relief are stated in the brief of her counsel as follows: "The plaintiff contends that her right to equitable relief, whether redemption or damages, became fixed at the time of the wrongful foreclosure of the second mortgage, and that the only effect of the foreclosure of the first mortgages is that redemption as a remedy may be no longer possible or practicable. Since the wrong which has been done may no longer be specifically righted because of an event subsequent to the wrongdoing, the plaintiff contends that relief should be awarded her in damages, according to settled principles of equity jurisprudence."

The master found upon evidence which is not before us that there was due the defendant when the mortgage was attempted to be foreclosed on May 2, 1907, the sum of $2,147.93, and that this sum had been increased to $3,593.68 on August 15, 1919; that no tender of payment had ever been made by the plaintiff; and that the property was worth $30,000 on May 2, 1907. The plaintiff contends that, if relief by redemption is no longer possible because of the foreclosure of the first mortgages, at common law she is entitled to damages suffered by reason of the defendant's wrongful foreclosure. If we assume that she would have been entitled to damages if she had sought a recovery therefor upon the principle decided in *Rogers* v. *Barnes*, 169 Mass. 179, and had not relied on her remedy to redeem for the invalid sale, she was not entitled to both remedies, — they are inconsistent with each other. *Rogers* v. *Barnes*, *supra*. *Hewitt* v. *Hayes*, 205 Mass. 356, 364. There was abundant evidence that she elected to waive damages and relied on redemption, and the master so found; she cannot because of the foreclosure of the first mortgages abandon that remedy and have the relief which she now seeks.

After the report of the master was filed, in which it was found that the foreclosure was invalid, no finding was made as to the

amount due the defendant; that was determined by the master afterwards appointed, who also found that "The plaintiff knew that the sale was to take place, knew the amount of the mortgage and interest due, and knew, or had opportunity to know, just what the balance due was," and that she made no tender of what was due and never questioned the account of the defendant, who through a third party was the real purchaser at the sale and remained in possession until the first mortgagee took possession seventeen and one half months later. In view of these findings the plaintiff cannot rely upon the fact that no judicial determination of the amount due the defendant was made before the foreclosure of the first mortgages; she had ample opportunity to protect her rights by paying or tendering the amount due after the decree setting aside the sale had been entered. The foreclosure of the first mortgages was after default, and there is nothing to show that the proceedings were not in all respects regular and valid; the Company had a right to foreclose and the defendant could not have prevented such action. The circumstance that the properties sold for less than their full value cannot affect the rights of the parties. *Austin* v. *Hatch*, 159 Mass. 198. *Downing* v. *Brennan*, 232 Mass. 535, 538. The purchase at the sale by Edward L. Logan for himself was not unlawful.

It was in evidence that the plaintiff on December 18, 1915, nearly seven years after an interlocutory decree had been entered allowing her to redeem from the sale made by the defendant, filed a motion that a decree be entered as of October 31, 1908, confirming the master's report and overruling the defendants' exceptions thereto, and that this motion was allowed; it therefore appears that long after the property had been sold under the first mortgages the plaintiff still relied on redemption, which was a full and adequate remedy if she had taken proper steps to protect her rights. The defendants were in no way legally responsible for the sale under the first mortgages by which the plaintiff lost her equity in the property; the loss of her right to redeem was not due to any wrongful act of the defendants or either of them, she has not suffered damage by their acts, and the master so found. He also found that "The plaintiff lost her land, not by reason of the sale of May 2, 1907, but because she failed to pay the debt due the Insurance Company." *Ryder* v. *Brockton*

Savings Bank, 235 Mass. 476. In *Dennett* v. *Codman*, 168 Mass. 428, a case analogous in some respects to the present case, it was said of the plaintiffs at page 429: "Having elected their remedy, and having obtained full satisfaction, which failed to be beneficial to them only through their misfortune or neglect, there is nothing left upon which they can found a claim for damages." *Flanders* v. *Hall*, 159 Mass. 95. *Hewitt* v. *Hayes*, *supra*. The plaintiff did not mistakenly choose a remedy that did not actually exist as in *Snow* v. *Alley*, 156 Mass. 193. *Doucette* v. *Baldwin*, 194 Mass. 131.

The conclusions of law stated by the master that the plaintiff was not entitled to recover on the facts found by him, did not harm the plaintiff as the court must finally determine what the law is on the facts as found. *S. K. Edwards Hall Co.* v. *Dresser*, 168 Mass. 136, 139, 140. A careful examination of the entire record discloses no error.

The plaintiff having died since the bringing of the bill, the final decree should be amended by providing that the balance of the fund remaining after satisfying the amount due Lawrence J. Logan be paid to the administrator of the estate of Mary A. O'Brien. As so amended the decree is affirmed.

Ordered accordingly.

GERTRUDE A. BLAIR *vs.* CITY OF BROCKTON.

Plymouth. October 18, 1920. — November 30, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Equity Jurisdiction, To enjoin trespass. *Municipal Corporations*, Drainage. *Drain*. *Water Rights*.

A suit in equity cannot be maintained to enjoin a city from draining water by a twelve inch pipe from a public way and through an artificial open ditch across land of a third person and land of the plaintiff to a six inch pipe under a private way which discharged beyond the plaintiff's land, although the result of such method of draining is to cause water to overflow upon the plaintiff's land, where the ditch was dug many years after the twelve inch pipe was laid and it does not appear that the city caused it to be dug or the six inch pipe to be laid or ever maintained or recognized either as a means of drainage or otherwise.

BILL IN EQUITY, filed in the Superior Court on January 7, 1918, seeking to restrain the defendant from draining water from Woodland Avenue, a public highway bounding land of one Hammond, across land of Hammond and of the plaintiff in such a way that surplus water overflowed and flooded land of the plaintiff, and for damages.

In the Superior Court the suit was referred to a master. Findings of the master are described in the opinion. The suit was heard by *McLaughlin*, J., upon the pleadings, the master's report, exceptions by the plaintiff thereto and motions to confirm the report and for a decree, and by his order a decree was entered that a mandatory injunction issue enjoining the defendant from discharging water from the catch basin in Woodland Avenue into the drain pipe running from that catch basin to land of one Hammond and from collecting the drainage of Woodland Avenue by means of the catch basin and allowing it to be carried through the drain pipe to Hammond's lot in such manner that it would overflow and flood the land of the plaintiff; and that the defendant pay the plaintiff the sum of $400 damages and costs of suit and that execution issue therefor. The defendant appealed.

The case was submitted on briefs.

W. M. Wilbar, for the defendant.

R. T. Anthony, for the plaintiff.

CROSBY, J. This is a bill brought to enjoin the defendant city from causing water to be drained from a highway upon the plaintiff's land, and for damages. The case was referred to a master and as the evidence is not reported his findings of fact are final.

The plaintiff is the owner of a lot of land with a dwelling house thereon situated on the northerly side of Manners Avenue, a private way in the city of Brockton. North of this lot on the south side of Woodland Avenue is a large tract of land owned by one Hammond. Woodland Avenue is a public way, the south line of which is about two hundred and eighty feet north of the plaintiff's line. The northerly part of the plaintiff's lot is the lowest point in a watershed having an area of thirty-one acres to the north of Manners Avenue, and under natural conditions, were it not for a slight ridge along the plaintiff's northerly boundary line, would take the water from the northerly and northeasterly portions of this area. Woodland Avenue was laid out by the de-

fendant city as a public way on July 17, 1891, at substantially the same grade as it had previously existed as a private way, and at the same time a catch basin for collecting surface water was constructed on the northerly side of the avenue, from which a twelve inch pipe extends under the street to its south line and thence about forty feet into the land of Hammond; through this pipe surface water flows from the catch basin on to Hammond's land, and discharges into an artificial open ditch which extends through Hammond's land to its southerly boundary line and finally over a part of the plaintiff's land to Manners Avenue; here, a six inch pipe is laid from the ditch, under the avenue to a point about eighty feet southerly of the south line thereof where it comes to the surface. During heavy rains the water coming from Woodland Avenue and flowing through the pipe on Hammond's land, together with water from other smaller ditches on his land, runs through the main ditch to the plaintiff's land, and being unable to pass off through the six inch pipe, overflows her land.

The master also found the following facts: that Woodland Avenue is properly drained; that the discharge of surface water on Hammond's land from the catch basin is an incident to the layout of the avenue; that no larger quantity of surface water is collected than before the layout, although it is discharged more rapidly than before; that the water so discharged is a remote, and not a proximate cause of the damage to the plaintiff; that were it not for the ditch no water would come to the plaintiff's land from Woodland Avenue; that the ditch was dug by some one for the purpose of getting rid of surface water accumulating on the land now owned by Hammond and was dug within twelve years previous to the filing of his report, September 3, 1918; that Hammond is the only person who has ever worked on the ditch as shown by the evidence, and that the defendant is not responsible for it; that it did not appear who laid the six inch pipe under Manners Avenue, that there was no evidence that the defendant laid that pipe or dug or caused to be dug the ditch or ever maintained or recognized either as a means of drainage or otherwise.

Upon these findings, it is plain that the acts of the defendant in constructing the catch basin and laying the twelve inch pipe therefrom on to the Hammond land were not the proximate effi-

cient cause of the surface water overflowing the plaintiff's land, but that the digging of the ditch and the accumulation of water therein, together with the smallness of the six inch pipe, for which the city is in no way responsible, have caused the land of the plaintiff to be overflowed. The master expressly found that were it not for the ditch no water would come to the plaintiff's land. Upon these findings the defendant is not liable for the injuries which the plaintiff has sustained. *Dupuis* v. *Fall River*, 223 Mass. 73. *McMahon* v. *Holyoke*, 226 Mass. 450.

It is unnecessary to consider or decide whether the defendant would have been liable if it had caused the water which finally was discharged on the land of the plaintiff to be discharged from the twelve inch pipe into the ditch.

The trial judge, upon the findings of the master, found that by reason of the laying of the twelve inch pipe, "the volume of water carried in a given space of time exceeded that which otherwise would have been carried in the same space of time, and the plaintiff's land suffered in consequence materially greater damage than it would were it not for this method of construction . . . and that the defendant city had no right to lay said pipe through the land of Hammond for the purpose of conducting the water and discharging it into the open ditch at the end of the pipe and thence upon the plaintiff's land, and that the plaintiff is entitled to damages."

This conclusion overlooks the fact as found by the master that the ditch was not in existence when the city laid the pipe which discharged the water from the catch basin on to the land of Hammond, but was dug many years later. Until that occurred no water from Hammond's land would flow on to that of the plaintiff. Accordingly the case of *Daley* v. *Watertown*, 192 Mass. 116, is not applicable to the facts as found in the case at bar.

Although the plaintiff's exceptions to the master's report technically are not before us, we have nevertheless considered them to the extent of determining that there is no merit in any of them affecting the final disposition of the case.

The decree is reversed, and a decree is to be entered dismissing the bill. St. 1913, c. 716.

So ordered.

COMMONWEALTH *vs.* ISRAEL LEVENTHAL & others.

Suffolk. October 21, 22, 1920. — December 2, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Evidence, Of intent, Competency, Testimony of accomplice. *Practice, Criminal*, Evidence of previous crime, Variance, Continuance, Change of venue. *Venue. Witness*, Accomplice in crime, State's evidence. *Jury and Jurors. Pleading, Criminal*, Indictment, Plea, Motion to quash, Abatement.

At the trial of an indictment charging three defendants in one count with burning an insured building in February with intent to injure the insurer and in another count charging a fourth and a fifth defendant with having incited and procured the three principals to commit the crime to defraud the insurer, no error is committed in admitting, in addition to evidence of the February fire and the participation of all the defendants therein, evidence relating to incendiary fires in the same building in the preceding October and November, although it appears that none of the principals participated in the October and November fires and that the fourth defendant did not participate in the October fire, if the jury are instructed to disregard the evidence of the preceding fires so far as the first three defendants were concerned, that there was no evidence connecting the fourth defendant with the October fire, and that the only purpose of the evidence was to aid the jury in determining the question of intent as bearing on the count against the fourth and fifth defendants.

At the trial of an indictment charging several persons with a crime, where two of them, one after pleading guilty and the other after an entry of *nolle prosequi* had been made as to him, testified for the Commonwealth and against their co-defendants, the first acknowledging participation in the crime and the second admitting knowledge that it was being contemplated, it was for the jury to determine what weight should be given to such testimony and whether, upon it alone, the remaining defendants should be convicted.

There was no error in instructions given to the jury as to the testimony of the first of the two government witnesses above described, that it was the jury's duty to take into consideration what he said about himself, "that he, for money, did this thing, as bearing upon the weight you will give his testimony. . . . It will be important again in determining the weight to be given his testimony, and from independent sources than from him, how far and to what extent, if at all, his story is corroborated in whole or in part;" nor in instructing them as to the second witness "to take into consideration . . . his connection . . . with this fire and his knowledge prior to the fire."

Where the evidence at the trial of an indictment charging the burning of a "dwelling house of A" tends only to show the burning of a dwelling house owned but not dwelt in by A, there is no variance.

A general plea of not guilty to an indictment is an admission of its validity and a waiver of all matters in abatement.

No exception lies to a refusal of a request of a defendant under indictment for

leave to withdraw a plea of not guilty and to file a motion to quash the indictment and a plea in abatement grounded on allegations that, when the grand jury were considering the case, other persons than members of the grand jury and witnesses were present when other witnesses were testifying; and the fact that the request to withdraw the plea was made does not alter the rule that all matters in abatement of the indictment were waived by the general plea of not guilty.

Article 5 of the Amendments to the Constitution of the United States does not apply to proceedings in the courts of the Commonwealth; and therefore a plea in bar to an indictment, charging the burning and the procuring of the burning of a dwelling house and the burning and the procuring of the burning of an insured building with intent to defraud the insurer, must be overruled if the ground of the plea is only that the defendants were lawfully summoned and were required to testify "at the sitting of the Grand Inquest" concerning the matters which were there inquired into and which were the subject matter of the indictment and that by the further prosecution of the indictment the defendants were "deprived of the privileges and immunities guaranteed" in that amendment to the Federal Constitution.

It was *said*, that, on the plea in bar above described, the questions, whether the defendants when compelled to testify before the grand jury were deprived of their rights under art. 12 of the Declaration of Rights of our Commonwealth, and the extent to which their general plea of not guilty was a waiver of their rights, were not before this court.

No error was found by this court in the denial by a judge of the Superior Court of motions for a continuance and a change of venue of the indictments above described, offered when the indictment was about to be tried in the county of Suffolk on the ground that certain publications in certain daily newspapers in Boston were prejudicial to the defendants.

INDICTMENT in six counts, found and returned on September 4, 1916. The first count charged that Eddie Kandler, Israel Leventhal, Jacob Leventhal and Jacob Smaller on February 15, 1916, "wilfully and maliciously did burn the dwelling house of Annie Levine." The second count charged that Abraham L. Matthews, Simon Levine and Samuel Lishner procured those named as defendants in the first count to commit the arson there charged. The third count charged the defendants named in the first count with burning an insured building with intent to injure the insurers, and the fourth count charged the defendants named in the second count with procuring those named in the third count to commit the crime there charged. An entry of *nolle prosequi* was made as to the fifth and sixth counts before trial; and as to the second and fourth counts such an entry was made as to Abraham L. Matthews. On September 13 and 14, 1916, all the remaining defendants pleaded not guilty. At the time of trial Kandler pleaded guilty and testified for the Commonwealth.

On October 16, 1916, the case was placed upon the list of cases assigned for trial for October 23. On October 20, the defendants filed a motion for a continuance and a change of venue, based on allegations in substance that they were prejudiced by articles published in certain daily newspapers relating to the crimes with which they were charged. The motion was overruled.

The defendants thereupon filed a motion to quash the indictment on the grounds that the dwelling house alleged to have been burned was not sufficiently described, and that the counts in the indictment were improperly joined.

On October 23, the defendants filed a plea in abatement based on allegations that a police officer and others, not members of the grand jury or witnesses, were present in the grand jury room when the case was being heard by the grand jury and witnesses were testifying, and a plea in bar based on the allegation that the defendants were summoned and were required to testify "at the sitting of the Grand Inquest . . . of and concerning the matters and things then and there being inquired into, and now contained in this presentment;" and that the prosecution of the indictment deprived them of the privileges and immunities guaranteed by art. 5 of the Amendments to the Constitution of the United States.

In presenting the foregoing motion and pleas other than the motion for continuance and change of venue, the defendants asked leave to withdraw their pleas of not guilty for that purpose. The district attorney objecting, the request was refused and the motions were overruled.

The case then was tried before *Sisk*, J. Material evidence is described in the opinion. At the close of all the evidence the defendants asked the judge to instruct the jury as follows:

"1. While it is competent for the government to introduce the evidence of accomplices in support of the allegations contained in the indictment, such evidence is to be taken with great caution unless it is corroborated by independent evidence tending to substantiate a material part of the allegation. Mere multiplication of accomplices does not satisfy this requirement of corroboration in a material particular.

"2. There is no corroboration by independent proof of material facts in the evidence offered through the witnesses Kandler and Matthews."

"4. If the jury shall find that the witness Kandler contradicts the witness Matthews, this contradiction should be taken into account by the jury in determining the truthfulness of both in their entire testimony and the weight to be given it.

"5. In judging of the truthfulness of the witness Kandler and of the weight to be attached to his testimony, the jury should take into account that he is a self-confessed criminal of more than one burning in which human lives might have been taken and wilful murder thus committed.

"6. It is not to be presumed that the fire named in this indictment was set by Kandler because he says he did it. Proof of the fire and the person or persons who set it must be proven to the satisfaction of the jury beyond a reasonable doubt."

The requests were refused.

Israel and Jacob Leventhal and Smaller were found guilty of the crime charged in the first and third counts, and Levine and Lishner were found guilty of those charged in the second and fourth counts. All such defendants alleged exceptions.

H. H. Pratt, for the defendants Levine, Smaller, and the Leventhals.

E. Greenhood, for the defendant Lishner.

A. C. Webber, Special Assistant District Attorney, for the Commonwealth.

CARROLL, J. The defendants Smaller, Israel Leventhal and Jacob Leventhal were found guilty on the first and third counts of the indictment. The first count charged them with burning the dwelling house of Annie Levine. In the third count they were accused of burning a building with the intent to injure certain insurance companies. They were sentenced on the third count. Levine and Lishner were found guilty on the second and fourth counts. They were sentenced on the fourth count. The second count charged them with procuring the Leventhals, Smaller and Kandler to commit the felony, and the fourth count alleged they did incite and hire Smaller, the Leventhals and Kandler to burn the building in order to defraud the insurers. A *nolle prosequi* was entered in the indictment against Abraham L. Matthews who was a witness for the Commonwealth.

The time of the burning alleged in the indictment was February 15, 1916. A fire occurred on that day in the building numbered

235–237, 239 Dudley Street, Boston, owned by Annie Levine, wife of the defendant Simon Levine, upon which building the defendant Lishner held the second mortgage. There was evidence of previous fires in the building, — in October and November, 1915. Kandler, who pleaded guilty and was a witness for the Commonwealth, testified that "about October 1st, 1915, he met" Reuben Levine and the defendant Simon Levine and was told that Simon bought the house from Lishner and was to have it remodelled, but before "starting to do anything in the house, 'the only thing' was 'to set a fire in that house' and they would 'have some money,' meaning insurance; that they hired Lurie" to set the fire; that "on the next day, Saturday," Simon Levine "paid Lurie $25," Levine saying that "he would not have much out of it; that the fire was 'small loss.'" Kandler further testified that after the October fire Simon Levine asked him and Reuben Levine to do the plastering and paper hanging. They agreed to do it for $27.50, but the contract was made out for $77.50, Simon Levine agreeing that the $77.50 would include "setting another fire in that house;" that some of the work had been done, when Simon Levine told him not to set the fire until he should "get insurance;" that "after Simon Levine got the first draft" they were told to go to work, and began "papering downstairs;" that Reuben and Lishner went to the top floor and broke holes in the closets and ceiling, when Kandler said the "janitor was watching." They told Kandler to go out for wall paper so that "they should not have suspicions on the witness;" and that when he returned the fire department was working on the building. This was the second fire, November 16, 1915, and on that day Kandler brought to the house some plaster of paris, lime and ten gallons of turpentine. According to Kandler, about the first of February, 1916, Simon Lishner said to him that the two previous fires were not successful, it would cost $7,000 to replace the house, and the only thing to do was "'to make a good fire there' so that the building should burn down." Simon Levine and Lishner urged him to set the fire, Lishner agreeing that Smaller and the two Leventhals would assist him, and that they would be paid $600. Kandler consented to this arrangement and a few days before the fire he, with the Leventhals, made holes in the plastering and flooring so that the fire would spread rapidly; turpentine was spread on the various

floors and after the fire started he was driven away in an automobile with Smaller and the Leventhals, and was paid $125.

1. There was no evidence that Jacob and Israel Leventhal and Smaller were concerned in the fires in October and November, and nothing to show that Lishner was concerned in the October fire. The evidence tended to show, however, that Lishner was connected with the November fire and that Simon Levine participated in both fires. The jury were carefully instructed on this branch of the case. They were told to disregard the evidence relating to these fires, so far as the defendants Smaller and the Leventhals were concerned; and that there was no evidence in the case connecting Lishner with the fire of October 15, that the only purpose of the evidence was to aid them in determining the question of intent as bearing on the fourth count of the indictment.

Evidence tending to prove similar but distinct crimes committed by the defendant is not admissible to show that he is guilty of the crime charged. The burnings of the building in October and in November were evidence, however, against the parties participating in these fires, as showing that the burning in February, 1916, was wilful and intentional and not the result of accident or negligence. The evidence, if believed, tended to prove that the building was burned in February to defraud the insurers. To show the purpose and intent with which this fire was set, evidence of previous acts indicating an existing disposition controlling the defendants in the commission of the crime was itself admissible; being competent for this purpose, it was no objection that it tended to prove other crimes. *Commonwealth* v. *Bradford,* 126 Mass. 42, 44. *Commonwealth* v. *Bean,* 137 Mass. 570. See in this connection *Commonwealth* v. *Coyne,* 228 Mass. 269.

2. The judge was not required to give the first and second requests for instructions asked for by the defendants. He was not bound to instruct the jury that the evidence of an accomplice was to be taken with great caution unless corroborated in a material point. The jury were told, in speaking of the testimony of Kandler, that it was their duty to take into consideration what he said about himself, "that he, for money, did this thing, as bearing upon the weight you will give his testimony. . . . It will be important again in determining the weight to be given his testimony, and from independent sources than from him, how far and

to what extent, if at all, his story is corroborated in whole or in part." And in deciding the weight to be given the testimony of Matthews the jury were instructed "to take into consideration . . . his connection . . . with this fire and his knowledge prior to the fire." It may in some cases be unsafe to convict on the uncorroborated testimony of an accomplice, but in this Commonwealth it is entirely a question for the jury to decide. They may find it unwise to rely on such testimony, or they may believe it to be true. As the jury could convict on the evidence given by Kandler and Matthews, there was no error in the instruction given. *Commonwealth* v. *Bosworth*, 22 Pick. 397, 399. *Commonwealth* v. *Holmes*, 127 Mass. 424. *Commonwealth* v. *Wilson*, 152 Mass. 12. *Commonwealth* v. *Clune*, 162 Mass. 206. *Commonwealth* v. *Bishop*, 165 Mass. 148. *Commonwealth* v. *Phelps*, 192 Mass. 591. *Commonwealth* v. *Brennor*, 194 Mass. 17. It was shown that there was a fire in the building numbered 235–237, 239 Dudley Street, on February 15, 1916, and the Commonwealth did not rely entirely on the evidence of Kandler and Matthews to prove this fact, but on their uncorroborated testimony it was open to the jury to convict. The defendants were not in any way harmed by the manner in which the remaining requests were dealt with by the presiding judge. So far as they are correct statements of law, they were fully covered by the charge.

3. It is the contention of the defendants that there was a variance between the allegation and proof. It was alleged in the first count that the building burned was the dwelling house of Annie Levine. She was the owner of the building, but never lived in it. At the time of the fire it was only partly occupied. On the street floor there was a plumber's shop and a tailor's shop, the latter belonging to Matthews, who, with his family, dwelt in the rooms in the rear. In *Commonwealth* v. *Elder*, 172 Mass. 187, the defendant was indicted for burning a barn of Sarah L. Wright within the curtilage of her dwelling house. The proof was that the barn was her property, situated within the curtilage of the dwelling house owned by her, but in which she had never lived, and which at the time was occupied by her tenant who dwelt in the house and occupied the barn. It was there decided that the averment that it was the dwelling house of the owner, was satisfied by proof that it was an actual dwelling owned by her. And in com-

menting on *Commonwealth* v. *Barney*, 10 Cush. 478 (upon which the defendants in the case at bar rely), where the house had not been dwelt in for months and was the dwelling of no one, it was said: "In *Commonwealth* v. *Barney* the contention was whether the building was a dwelling house within the meaning of the statute, and not whether there was a variance between the proof and the allegation that it was the dwelling of its owner." The present case is governed by *Commonwealth* v. *Elder*.

4. After the defendants pleaded not guilty they filed a motion to quash the indictment; a plea in abatement, based on the fact that an officer of the police force of the city of Boston and other persons not members of the grand jury, or witnesses, were present while the grand jury were investigating the facts concerning the crime charged; and a plea in bar, alleging that they should not be further held to answer the indictment because they were summoned to appear before the grand jury and compelled to testify concerning matters there inquired into; and they asked that they be permitted to withdraw temporarily their pleas of not guilty and file the pleas and motion.

The motion to quash was overruled properly. By their plea of not guilty the defendants admitted the validity of the indictment, and their plea was a waiver of all matters in abatement. The objections to the indictment now relied on in the motion to quash could be raised only before the general plea of not guilty. *Lebowitch* v. *Commonwealth*, 235 Mass. 357, and cases cited.

There was no error in the refusal to permit the withdrawal of their pleas of not guilty, and the fact that this request was made does not alter the rule that all matters in abatement were waived by the general plea of not guilty. For the reasons just stated the plea in abatement was overruled properly. *Lebowitch* v. *Commonwealth*, *supra*.

There was no error in overruling the plea in bar. The plea alleged that "the defendant . . . ought not further to be held to answer to the indictment" because "he was lawfully summoned to appear before said Court at the sitting of the Grand Inquest" and was there required to testify concerning the matters then and there inquired into; and "that by the further prosecution hereof he is deprived of the privileges and immunities guaranteed to him in Article 5 of the Articles in addition to and amendment of the

Constitution of the United States." The fifth article of the Amendment to the Constitution of the United States does not apply to proceedings in the State courts. *Commonwealth* v. *Murphy*, 165 Mass. 66. *Commonwealth* v. *Hitchings*, 5 Gray, 482. "That the first ten Articles of Amendment [to the Constitution of the United States] were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since." Waite, C. J., in *Spies* v. *Illinois*, 123 U. S. 131, 166. To the same effect is *Minneapolis & St. Louis Railroad* v. *Bombolis*, 241 U. S. 211, and cases cited at page 217. The question whether the defendants when compelled to testify before the grand jury were deprived of their rights under art. 12 of our Constitution and the extent to which their general plea of not guilty was a waiver of their rights, are not before us on the plea in bar; on this point see *State* v. *Duncan*, 78 Vt. 364.

We find no error in denying the motion for a change of venue, see *Crocker* v. *Justices of the Superior Court*, 208 Mass. 162, 180; nor in the conduct of the trial.

Exceptions overruled.

ROSE M. PORTER *vs.* TRAVELERS INSURANCE COMPANY.

Suffolk. December 3, 1920. — December 3, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Judgment, Vacation. *Practice, Civil*, Exceptions, Amendment.

On an exception to the dismissal of a petition for the vacation of a judgment for the defendant in an action brought by the petitioner as plaintiff, it appeared that the action had been entered in the Superior Court in 1907; that on the plaintiff's motion it was ordered on June 6, 1917, that the action be continued "to be disposed of on or before January 7, 1918, or to be on that date dismissed; no further extension to be granted to the plaintiff;" that the record did not show the grounds for the making of the order; that the case in fact was continued until January 18, 1918, when a motion was filed for entry of judgment for the defendant; that on January 26 the action was dismissed as of January 7, 1918, in accordance with the order of June 6, 1917, and that there were no sit-

tings of the Superior Court from December 21, 1917, to January 14, 1918. *Held*, that

(1) The making of the order of June 6, 1917, rested in the sound discretion of the Superior Court and there was nothing to show an unwise exercise of that discretion;

(2) The granting or denial of a petition to vacate a judgment is largely discretionary, and the record did not show a failure to exercise sound judgment.

Where, upon an exception to the denial of a motion to amend a bill of exceptions, the record shows merely the motion and its denial, the exception must be overruled.

PETITION, filed in the Superior Court on March 5, 1918, for the vacation of a judgment for the respondent in an action brought by the petitioner against it.

In the Superior Court the petition was heard by *Hitchcock*, J. Material facts are stated in the opinion. The petition was denied; and the petitioner alleged exceptions, which, after the death of *Hitchcock*, J., were allowed by *Wait*, J., on April 9, 1920.

On October 6, 1920, the petitioner moved to amend her bill of exceptions by adding allegations to the effect that she was ready to try her action against the respondent "at any time during the first week in January, 1918; that she asked the court to assign said cause for trial sometime in the months of November or December, 1917, but Mr. Badger [the defendant's counsel] requested the court to order it for trial the first week in January, 1918, and Justice Hall so ordered, thereby limiting this plaintiff to the first week in January, 1918, to try this cause."

The motion was heard and was denied by *Wait*, J., and the petitioner alleged a further exception thereto.

R. M. Porter, pro se.

C. M. Pratt, (*W. I. Badger* with him,) for the respondent.

BY THE COURT. This is a petition to vacate a judgment. The action was entered in August, 1907, and was continued from time to time until June 6, 1917, when on the plaintiff's motion it was ordered that the case be continued "to be disposed of on or before January 7, 1918, or to be on that date dismissed; no further extension to be granted to the plaintiff. Terms of continuance, $15 to be paid on or before January 7." No evidence is reported as to the grounds for making this order. Such order under the circumstances here disclosed rested in sound judicial discretion. There is nothing to show that it was not wisely exercised. Rule

27 of the Superior Court (1915). The case was in fact continued until January 18, 1918, when a motion was filed for entry of judgment. The court on January 26, 1918, ordered that as of January 7, 1918, the action be dismissed in accordance with order of June 6, 1917. On January 14, 1918, judgment was entered. Motion to vacate the judgment was seasonably filed, and was denied, as stated in the exceptions, "notwithstanding your petitioner presented to the court evidences that said jury sessions of the Superior Court for the county of Suffolk were closed by order of the court from December 21, 1917, to January 14, 1918." It is manifest that even in view of the suspension of the sittings of the court, the order for judgment might be entirely just. The granting of a motion to vacate judgment is largely discretionary. There is nothing to show failure to exercise sound judgment. *Hunt* v. *Simester*, 223 Mass. 489, 492.

The record is bare of any indication that the denial of the motion to amend the exceptions was not right. *Commonwealth* v. *Dow*, 217 Mass. 473, 482, 483.

Exceptions set forth in each bill of exceptions overruled.

JOSEPH BILODEAU *vs.* FITCHBURG AND LEOMINSTER STREET RAILWAY COMPANY.

Worcester. September 28, 29, 1920. — December 6, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, Voluntary intoxication, Street railway. *Passenger. Intoxicating Liquor. Practice, Civil*, Requests, rulings and instructions, Exceptions, Rebuttal. *Evidence*, Hospital record, To contradict witness. *Witness*, Contradiction.

At the trial of an action against a street railway company for personal injuries, it appeared that the defendant's tracks were upon a highway, and there was evidence tending to show that the plaintiff entered a car of the defendant, paid his fare and, because of the crowded condition of the car, remained in a back vestibule; that the car was "behind time," and, as it moved down grade over a track not thoroughly constructed and to some extent out of repair and entered a curve in the track, it was going at the rate of twenty to twenty-five miles an hour, which was in excess of the speed allowed by the defendant's rules

governing the running of its cars; that, owing to the swing of the car when it passed over the curve, the plaintiff lost his hold on the controller, by which he was steadying himself, was unable to seize any other support and was thrown from the car to the track and rendered unconscious, and that a car of the defendant immediately following ran over his legs. *Held*, that

(1) A finding that the plaintiff was a passenger while in the rear vestibule was warranted;

(2) Findings were warranted that the plaintiff was not guilty of contributory negligence, and that the defendant or its employees were negligent;

(3) A verdict for the plaintiff was warranted.

At the trial of the action above described, there was evidence tending to show that, shortly before entering the street car, the plaintiff had drunk intoxicating liquor, and the defendant contended that in consequence thereof he became intoxicated and that his fall from the car was the result of such intoxication. *Held*, that the question, how far, if in any degree, the use of the intoxicating liquor caused the plaintiff's fall or contributed to his injuries, was for the jury.

At the trial above described, the defendant asked for the following rulings: "If the plaintiff's voluntary use of intoxicating liquors so affected the plaintiff while he was upon . . . [the first car] that he acted in a way other than the way an ordinarily prudent man would act and comport himself upon a street railway car under the circumstances in which the plaintiff found himself, and as a result, either wholly or in part, he fell or was thrown from . . . [the first car], he was not in the exercise of due care, and he cannot recover." "If the use of intoxicating liquors by the plaintiff contributed in any degree to cause his injury he cannot recover." There was no evidence of wilful, wanton or reckless misconduct on the part of the defendant's employees in control of the second car. The rulings were refused, subject to exceptions by the defendant, and this court *held*, that they accurately stated the law and that they were not unequivocally and positively given in the charge; and the defendant's exceptions were sustained.

If, in the action above described, it was found that the fall of the plaintiff from the street car upon which he was riding was not caused by contributory negligence on his part, then he did not cease to be a passenger while lying upon the track and the defendant was required in the operation of the second car to use toward him the care it owed to a passenger.

If voluntary intoxication on the part of the plaintiff in the action above described was found to be the direct and proximate cause of his fall from the car upon which he was a passenger, his rights as a passenger ceased when he fell, and thereafter he had the rights only of a traveller upon the highway.

At the trial of the action above described, there was no evidence that either the motorman or the conductor of the street car upon which the plaintiff was a passenger had any knowledge of his intoxicated condition, if such condition existed, and it therefore was *held*, that the decision in *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448, was not applicable.

At the trial of the action above described, there was no evidence justifying a finding that the motorman of the second car, which ran over the plaintiff, was guilty of wilful, wanton or reckless conduct. The plaintiff contended that he had been guilty of such conduct. The defendant asked for rulings as follows: "If the plaintiff's lack of care contributed in any degree to his fall from . . . [the first car], he cannot recover for any injury sustained in said fall or as a result of the injury which befell him when . . . [the second car] ran over his

legs, unless there is evidence that the motorman of . . . [the second car] was guilty of wilful and wanton negligence." "There is no evidence of wilful or wanton negligence on the part of the motorman of . . . [the second car.]" *Held*, that, while the language of the rulings requested, in speaking of "wilful . . . wanton negligence," was inaccurate, the requests directed the attention of the trial judge to an aspect of the case which called for an instruction that there was no evidence sufficient to support such a contention of the plaintiff, and that it was error not to give appropriate instructions upon the subject.

An exception saved by the defendant, at the trial of the action above described, to the admission of certain rules of the public service commission requiring wheel guards and fenders on street cars, was overruled, although there was no evidence that the rule had been disobeyed, the judge in his charge having instructed the jury to disregard the evidence.

A rule of the defendant relating to spacing and speed of cars following one another was *held* properly to have been admitted at the trial above described, with a sentence at the end, "No excuse will be received for a rear-end collision," omitted; and it also was *held* that the defendant was not harmed by such omission.

Even if records of certain alleged rules established by the defendant, in the action above described, governing the conduct of its employees, were destroyed and therefore could not be put in evidence, testimony of a former employee of the defendant describing certain orders and instructions given to him by a claim agent of the defendant was not admissible in the absence of evidence of authority of the claim agent to issue such orders or instructions on behalf of the defendant.

Where a witness in direct examination has answered questions relating to a relevant matter by stating merely that he did not remember, the party calling him cannot introduce, for the purpose of contradicting his witness, evidence of statements previously made by the witness on the subject matter under inquiry.

At the trial of the action above described, there was evidence that, after his injury, the plaintiff was taken to a hospital, and a hospital record was introduced in evidence which, among other things, stated that the plaintiff "Vomited fluid twice resembling coffee grounds & had an odor of whiskey." In his instructions to the jury, the trial judge ruled that the record might be "admitted as far as it relates to the treatment and medical history" of the plaintiff's case. *Held*, that the use of the record was too much restricted by the judge and that, under Sts. 1905, c. 330, § 2; 1912, c. 442, § 2, the statement in the record above quoted was evidence of the fact that the odor of whiskey in the *vomitus* existed very shortly after the accident and came from a use of whiskey before the plaintiff had boarded the defendant's car.

At the trial of the action above described, the judge permitted the plaintiff in rebuttal to call a claim agent of the defendant, who had not testified previously, and to ask him whether he had had a certain conversation with the plaintiff in the hospital in which he had made inquiries as to whether or not the plaintiff had been drinking on the night when he was injured, and, upon the claim agent denying such conversation, the judge permitted the plaintiff to be recalled and to testify that such a conversation had occurred, and that, in response to the claim agent's inquiries, he had stated that he had not been drinking. *Held*, that, although the order in which evidence shall be introduced at a trial is wholly within the discretion of the trial judge, the evidence above described should have been excluded, it being evidence of self-serving statements by the plaintiff, and incompetent.

Testimony, at the trial above described, in cross-examination of a medical expert called by the defendant, that the witness had been employed by many insurance companies, and, in answer to a question, "You are acting for an insurance company now?" an answer "Not that I know of," followed by further testimony that he was "working for" the counsel for the defendant, are not grounds for taking the case from the jury and continuing it.

TORT for personal injuries. The allegations of the declaration were merely that the plaintiff "was a passenger upon one of the defendant street railway company's cars on September 21, 1918, when he was thrown off same and run over and both his legs cut off. And the plaintiff says that his injuries were caused by the negligence of the defendant, its officers, agents or servants." Writ dated June 21, 1919.

In the Superior Court the action was tried before *N. P. Brown*, J., during thirteen court days.

The instructions of the judge, referred to in the opinion, relating to rules of the public service commission as to wheel guards and fenders were as follows: "You will also recollect certain rules or regulations purporting to be regulations promulgated by the Public Service Commission upon the subject of jacks, wheel guards, etc., were put in evidence. You understand, of course, in the trial of a case of this kind, it is something like picking apples in the fall, you pick all that look good to you and take them to the house and then look them over again, and those that don't look good to you you throw away, and those that do, you keep. I am now trying to throw away some of those we collected earlier in the case which now don't look good as a matter of law. These regulations I instruct you have no application to this case. No evidence has been introduced connecting them sufficiently with the case so that I feel you are justified in any way in considering them. As you readily see, the presence of a jack on the car, and in some aspects perhaps wheel guards, might be material merely upon the question of damages, although there is a possibility that as to wheel guards the presence or absence of them might have some effect in preventing a possible injury. But there is no evidence in this case of the absence of wheel guards such as would justify the application of any regulations such as have been introduced nor of jacks nor of fenders."

The defendant's "Rule 120," referred to in the opinion was as follows: "120. Spacing. When several cars are operating on the

same running time, cars following should not run up to the leading car when stopped, but should stay back a distance of five poles, checking speed until the head car has started. This will apply to all operation except on turnouts and terminal points. Do not run closer to a preceding car than five hundred (500) feet unless ordered to do so. No excuse will be received for a rear-end collision."

The exceptions to the exclusion of evidence which the defendant asserted tended to contradict one of its own witnesses, referred to in the opinion, were saved under the following circumstances: One Berger, called by the defendant, had testified that in 1918 he had operated a café in Fitchburg where he had sold intoxicating liquors. To several questions as to whether the plaintiff was in his saloon on September 21, 1918, as to whether he had met and had had a conversation with Emerson W. Baker within a week and a half or two weeks preceding the trial, or as to any conversation he had had with him on the subject of the plaintiff, the witness answered that he did not remember. Later in the trial, the defendant called Emerson W. Baker, who testified that he was associated as counsel for the defendant, and offered to show that he had had a conversation with the witness Berger within a week and a half or two weeks of the trial, and that Berger had said to him "in substance, that he had been trying to find the man with whom he sent Bilodeau out of his saloon on the night of his accident and that so far he had been unable to find the man or secure his name." The evidence was excluded and the defendant saved an exception.

The evidence admitted in rebuttal, and referred to in the opinion, was in substance as follows: After the close of the defendant's evidence the plaintiff called one Reed, who testified that he was the claim agent of the defendant and who, under direct examination by the plaintiff's counsel, testified in substance that he had not participated in nor heard a certain conversation at a hospital where the plaintiff had been taken following the accident; and, to a question by the plaintiff's counsel, "Did you say to Joe Bilodeau that day, when you went up there, after the quarantine was lifted, — 'Joe, you were drinking that night, weren't you?' and he says to you, 'No, I wasn't,' and you said to him, 'Well, how is it that all these people down stairs say you were drinking;

the priest says you were drinking; how is it that they say that; are they all liars?' and Joe Bilodeau said 'I am not saying they are liars but I wasn't drinking and they must have misjudged me.' Did that conversation take place; answer Yes or No?" the witness answered "Absolutely no." The plaintiff then was recalled and, having been asked whether he had heard his counsel's questions of Reed "about the time he came to see you after the quarantine was removed" and having answered affirmatively, he was allowed to be further interrogated as follows: Q. "What did Reed say to you?" A. "He says 'You was drunk that night' and I said 'No, sir.' He said 'Do you mean to say that your priest and all those people down stairs are liars?' I said 'I don't mean to say they are liars but they must have misjudged me.'" — Q. "Were you under the influence of liquor at all that night?" A. "No, sir."

The priest referred to had been called by the plaintiff in his case in chief and had testified that he went to the hospital the night of the plaintiff's injury and "got there about midnight; saw the plaintiff"; "smelled no liquor on" him, "and saw no signs of intoxicating liquor on him at all; that the plaintiff was unconscious;" that he (the witness) "did not talk with anybody;" that "he never made any statement to anybody at any time regarding" the plaintiff's condition, and that he never saw Reed before the day of the trial, and never talked with him.

The cross-examination of the defendant's medical expert, referred to in the opinion, was as follows: Q. "You forgot to state how many insurance companies you were acting for, in your qualifications?" A. "Yes." — Q. "How many insurance companies have you been acting for?" A. "As many as there are in the city of Boston." — Q. "You are acting for an insurance company now?" A. "Not that I know." — Q. "You are acting for the F. & L.?" A. "I am acting for Mr. Milton [defendant's counsel]." — Q. "Are you acting for the F. & L.?" A. "In one sense, I am." — Q. "How much are you getting per day?" [The defendant's counsel interposed: "Do you claim there is any insurance company which has insured the F. & L.?" The plaintiff's counsel stated: "I would like to know, if the court please, what this gentleman's interest is here."] Q. "Are you an expert and is your sole interest working for the F. & L. Street

Railway Company or are you working for Dr. Gay [who had been called by the defendant] or somebody representing Dr. Gay, some insurance company representing Dr. Gay?" A. "No." — Q. "Who are you working for?" A. "Mr. Milton." — Q. "You don't know whom he represents?" A. "Yes." — Q. "Does he represent the F. & L. solely in this matter?" A. "Yes." — Q. "How much are you getting per day?" A. "As much as I can get. I don't know how much it will be."

After the introduction of the testimony above described, the defendant moved that the case be taken from the jury and be continued. The motion was denied.

Other material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor, and, that motion being denied, made forty requests for rulings, the first nine of which were to the effect that there was no evidence warranting findings of negligence on the part of the defendant or its servants or agents which would justify a verdict for the plaintiff. Other material requests were the following:

"19. If the plaintiff's lack of care contributed in any degree to his fall from Car 44 [the first car], he cannot recover for any injury sustained in said fall or as a result of the injury which befell him when the Car 50 [the second car] ran over his legs, unless there is evidence that the motorman of Car 50 [the second car] was guilty of wilful and wanton negligence.

"20. There is no evidence of wilful or wanton negligence on the part of the motorman of Car 50 [the second car]."

"25. If the plaintiff's voluntary use of intoxicating liquors so affected the plaintiff while he was upon Car 44 that he acted in a way other than the way an ordinarily prudent man would act and comport himself upon a street railway car under the circumstances in which the plaintiff found himself, and as a result, either wholly or in part, he fell or was thrown from Car 44, he was not in the exercise of due care, and he cannot recover.

"26. If the use of intoxicating liquors by the plaintiff contributed in any degree to cause his injury he cannot recover."

"37. Unless the defendant's negligence was the sole cause of the plaintiff's injuries, the plaintiff cannot recover."

The requests were refused. The jury found for the plaintiff in the sum of $30,000; and the defendant alleged exceptions.

C. C. Milton, (*E. W. Baker & F. L. Riley* with him,) for the defendant.

J. M. Hoy, (*M. F. O'Connell* with him,) for the plaintiff.

BRALEY, J. The plaintiff boarded the defendant's car, and, the conductor having received his fare, he became a passenger even if, because of its crowded condition, as the jury could find, he stood inside of the rear vestibule with one hand on the controller. *Lockwood* v. *Boston Elevated Railway*, 200 Mass. 537, 542. *Pomeroy* v. *Boston & Northern Street Railway*, 193 Mass. 507, 511. The defendant accordingly was bound "to use the highest degree of active diligence commensurate with the mode of transportation employed and the practical operation of its railway." *Marshall* v. *Boston & Worcester Street Railway*, 195 Mass. 284, 287, and cases cited. *Millmore* v. *Boston Elevated Railway*, 194 Mass. 323. *Thayer* v. *Old Colony Street Railway*, 214 Mass. 234. The plaintiff testified that while passing over a curve "all at once the car made an awful sway and I lost my hold; I was hanging on to the controller; and it threw me, when I saw myself go I dropped everything . . . and made a grab for the centre piece, the pole; my elbow touched the man standing next to the rod; I lost it and was thrown out head first; my head struck something and that is all I remember." Nor is there any dispute that as the plaintiff lay unconscious in the street with his body partially on one of the outer rails, a car of the defendant immediately following came up and passing over him inflicted severe personal injuries resulting in the amputation of both legs just below the knee. The jury, upon evidence which was properly admitted, could find that the car as it entered the curve was "behind time," and moving on a down grade from twenty to twenty-five or thirty miles an hour over a track which on the evidence of the plaintiff's experts was not at this point thoroughly constructed, and had become to some extent in disrepair, and the rate of speed was in excess of the company's rules. The defendant however contends that the swaying of the car was not unusual, and the descriptive adjectives of the various witnesses as to speed and lateral motion can add nothing to the probative force of their evidence. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. *Sanderson* v. *Boston*

Elevated Railway, 194 Mass. 337. But on the record a finding would have been warranted, that the car was "swaying — a sharp sway sideways," "going from one side to the other, shaking back and forth," "waving back and forth," and that these movements were excessive, violent and irregular, and that the plaintiff would not have been thrown off, nor would the accident have happened if there had not been negligence in the operation of the car. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527. *Marshall* v. *Boston & Worcester Street Railway*, 195 Mass. 284. *Spooner* v. *Old Colony Street Railway*, 190 Mass. 132, 134, 135, 136. *Nolan* v. *Newton Street Railway*, 206 Mass. 384, 389. *Bell* v. *New York, New Haven, & Hartford Railroad*, 217 Mass. 408, 410. *Griffin* v. *Springfield Street Railway*, 219 Mass. 55. *Johnson* v. *Bay State Street Railway*, 222 Mass. 583. *Creedon* v. *Galvin*, 226 Mass. 140. While it could have been found that shortly before taking passage the plaintiff to some extent at least had drunk intoxicating liquor, how far, if in any degree, its use caused his fall, or contributed to his injury was a question of fact. The jury might have been convinced on the evidence of the plaintiff and his witnesses that the amount of beer which he admitted to have taken was the only intoxicant used, and that it in no way affected his conduct. The defendant's motion for a directed verdict could not have been granted, and its requests that on all the evidence the plaintiff could not recover, and that there was no evidence of the defendant's negligence, or the negligence of its employees, and that the plaintiff was guilty of contributory negligence, and that there was no evidence which would warrant the jury in finding that the car was being operated at an excessive rate of speed, could not have been given. *Work* v. *Boston Elevated Railway*, 207 Mass. 447. *Heshion* v. *Boston Elevated Railway*, 208 Mass. 117, 118. *Griffin* v. *Springfield Street Railway*, 219 Mass. 55. *Vahey* v. *Boston Elevated Railway*, 222 Mass. 374.

Its remaining exceptions, substantially one hundred and thirty-seven in number, are to the failure to give other requests, and to certain portions of the instructions, and to rulings on the admission and exclusion of evidence.

It was as we have said for the jury to determine whether the plaintiff used intoxicating liquor, and if so, whether its use contributed in any degree to his injuries, and the defendant's twenty-

fifth and twenty-sixth requests, that if it did he could not recover accurately stated the law. *Labrecque* v. *Donham, ante,* 10. The requests were not unequivocally and positively given. The jury on this question and other material issues were instructed that, "The mere fact that a passenger who is injured on a common carrier is under the influence of intoxicating liquor, or even so far under the influence as to be called drunk, does not deprive him of the right of recovery. It is of importance, not in determining the extent to which his condition of possible intoxication went, but, in view of what may have been its extent, what effect it may have had upon his doing those things, or his failing to do those things which he should have done or should not have done to measure up to the standard of the reasonable, prudent, and careful passenger on that car that evening. For illustration, a man may be what is commonly known as paralyzed drunk and a passenger upon a common carrier, and, by reason of an act of negligence on the part of the carrier's servant, the car becomes derailed and he with other passengers is injured, he may recover under those assumed facts no less than the perfectly sober person who was sitting beside him, for the reason that neither one of them has done anything, or omitted to do anything which they should have done or should not have done under the circumstances to care for his own safety. Now what was Joe Bilodeau doing, what did he do, if anything, on the back platform that could be termed an act of negligence which contributed to his injury? And there is where we reach the first difficulty in the case. The injuries of which he complains were not received as an immediate result of the fall. In other words, it was not the fall which caused them. He was not thrown immediately in front of a passing car. He was not thrown on to a buzz saw. He was thrown and remained upon the ground for some period of time greater or lesser, before finally injured by another car. . . .

"Now that car was crowded and in taking a position on the rear platform, he was obliged to use such care as he was able to use — I don't mean with reference to his sobriety, but such care as the reasonable, prudent and careful man would have exercised under the circumstances to provide for his own safety upon that rear platform. . . .

"Then you have the second possible explanation of the facts

in the case, and that is, where you might possibly determine that both the company and Bilodeau's negligence contributed to his being thrown out of the first car. In that event, Bilodeau would still possess the status of a passenger if he lay stunned on the ground while the second car was approaching and was entitled to have the servants of the company use toward him the utmost care with regard to his safety consistent with the operation, the practical operation of the road, including the operation of the car which might have injured him. The company would be liable, in spite of Bilodeau's negligence, in spite of his intoxicated condition, if you should find he was in an intoxicated condition, if that condition and that negligence did not contribute to the running over of his legs, but if it rather was a condition. . . .

"Now suppose still a further possible situation here; and that is that no act of negligence on the part of the company was responsible for Joe's leaving the car, but it was entirely his fault that he got out of the car in the first place. In that event, I instruct you that he would nevertheless be a passenger until such time as he had had an opportunity, if such an opportunity existed, to re-establish another status. And the same rule of law would apply. What responsibility could be attached to the driver of the second car, there being no act of negligence on the part of the company by reason of the operation of the first, and he having gotten out of the first car by reason of his own negligence. Then you would have to determine whether or not at the moment he was run over by the second car, he was guilty of an act of negligence which contributed to that injury, or whether he had been there long enough in your opinion to make it merely a condition with which the second motorman had to deal. If it was not a condition under those circumstances and you should say that his negligent act came so near in point of time and distance to the place where he was injured and the time when he was injured that he was guilty of contributory negligence to the actual results to him, then he could not recover unless he should satisfy you by a fair preponderance of the evidence that he was run over by the wanton and wilful negligence of the motorman of the second car as I have already described to you wanton and wilful negligence. . . .

"The last possible view of the facts would be a situation where

neither the motorman of the first car nor Joe committed any negligent act resulting in his getting off of the first car. If you should view the situation as justifying that conclusion, the result would be determined entirely with reference to the care of the motorman of the second car. He would still have the status of a passenger as I have given it to you before, and the standard of care which would have to be observed by all other servants of the road, as well as those operating the car upon which he originally took passage as others, would be the utmost care consistent with the practical operation of the road. . . .

"You have therefore four possible views which you can take. First that so far as his leaving the first car was concerned, the company was negligent and he was not. Second, that both he and the company were negligent. Third, that he was negligent and the company was not. And fourth, that neither one of them was negligent. And then you will have to apply the principles with reference to the actual running over of his legs that I have attempted to describe to you."

The declaration in one count is at common law alleging that the plaintiff while a passenger upon one of the defendant's cars "was thrown off . . . and run over and both his legs cut off," and "that his injuries were caused by the negligence of the defendant, its officers, agents or servants." If the plaintiff's use of intoxicants did not in any degree contribute to his fall he did not cease to be a passenger while lying on the track, and the defendant's negligence in the operation and management of the first car could be found to be the efficient cause of all his injuries. *Eaton* v. *Boston & Lowell Railroad*, 11 Allen, 500. *Lynn Gas & Electric Co.* v. *Meriden Fire Ins. Co.* 158 Mass. 570, 574, 575. *Hudson* v. *Lynn & Boston Railroad*, 178 Mass. 64. *Igo* v. *Cambridge*, 208 Mass. 571. But if it were found that the plaintiff's voluntary intoxication was the direct and proximate cause of the fall, his rights as a passenger had terminated, and he had only the rights of a traveller on the public ways. *Hickey* v. *Boston & Lowell Railroad*, 14 Allen, 429. *Commonwealth* v. *Boston & Maine Railroad*, 129 Mass. 500, 502. *McKimble* v. *Boston & Maine Railroad*, 139 Mass. 542. *Creamer* v. *West End Street Railway*, 156 Mass. 320, 321. The plaintiff relies on *Renaud* v. *New York, New Haven, & Hartford Railroad*, 210 Mass. 553, as supporting the

instructions that in any event he continued to be a passenger. But that action was brought by an administrator under St. 1906, c. 463, Part I, § 63, to recover damages while a passenger for the death of his intestate. And as stated in the opinion the plaintiff under the statute could recover even if his intestate was not in the exercise of due care. It also was said that because of the intestate's violation of a regulation forbidding passengers to go upon the step of the car while the car was in motion, if death had not supervened, he could not in his own right have maintained an action for damages. The case at bar is manifestly different. The case of *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448, which apparently was followed to some extent in a part of the instructions previously quoted is also not in point. The jury in that case could have found that the plaintiff, a passenger, was so intoxicated that when the train stopped at the station he was unable to get off, and the conductor and brakeman took him out of the car, and up a flight of steps which led to the station platform, turned round and left him at the fifth or sixth step. The plaintiff for a moment balanced himself and then fell backward, turned a somersault and struck on the back of his head. After stating that if the plaintiff's voluntary intoxication was a direct and proximate cause of the injury he could not recover, the ground on which it was held that the plaintiff was entitled to go to the jury is as follows: "the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person . . . in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. . . . The fundamental principle is . . . that the plaintiff's condition, resulting from his previous negligence or wrong, is not a direct or proximate cause of the later injury, inflicted by one who acts independently, with knowledge of this condition and in reference to it." If it be assumed the jury in the present case might have been satisfied that the plaintiff was so intoxicated as to be incapable of exercising ordinary care, there is no evidence that the defendant's motorman or conductor on either car had any knowledge of his condition. The instructions were inadequate, misleading and erroneous.

The thirty-seventh request that unless the defendant's negligence was the sole cause of the plaintiff's injuries he could not recover, also should have been given without qualification.

We assume from the defendant's nineteenth and twentieth requests, when read in connection with a portion of the instructions, that the jury were asked by the plaintiff to find that the motorman of the second car had been guilty of wilful, wanton and reckless conduct. The issue is not open under the declaration. But aside from any question of pleading, which does not appear to have been recognized at the trial, we discover nothing in the record warranting such inference. The requests while inaccurately speaking of "wilful and wanton negligence," directed the attention of the judge to this aspect of the case, and he should have instructed the jury that the evidence was insufficient to support the plaintiff's contention. *Freeman* v. *United Fruit Co.* 223 Mass. 300. *Altman* v. *Aronson*, 231 Mass. 588. *Bergeron* v. *Forest*, 233 Mass. 392, 401, 402.

A new trial must be granted because of the errors to which we have sufficiently referred, and a further review of the requests and of the instructions would serve no useful purpose.

The exceptions to evidence not already covered by what has been said require no comment except as to questions likely to again arise. The rules of the public service commission requiring street railway cars to be equipped with headlights, wheel guards, fenders and lifting jacks, which were read to the jury in so far only as they related to wheel guards and fenders on the second car, should have been wholly excluded. But the judge having fully instructed the jury to disregard the evidence, the defendant fails to show reversible error. *Dempsey* v. *Goldstein Brothers Amusement Co.* 231 Mass. 461. *Clark* v. *Boston & Maine Railroad*, 164 Mass. 434. The book of rules and certain general orders or regulations of the defendant for the operation of cars, produced by the company's president at the plaintiff's request, were properly admitted, and the exclusion from the first paragraph of Rule 120 of the words, "No excuse will be received for a rear-end collision" did not harm the defendant. *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476, 478, 479, and cases collated.

It having appeared that a fire at the car barn had destroyed all previous records or orders, the plaintiff was permitted to show

by a former employee of the defendant that he received at the claim agent's office when being instructed as to his duties before entering upon his work, a verbal order, that on cars of the type in which the plaintiff was riding the doors were to be kept closed except "when the car was at a dead stop," and that, never having been revoked, it was still in force. The evidence should have been excluded. Even if a sufficient foundation had been laid to make secondary evidence admissible, a question it is not necessary to decide, the claim agent is not shown to have had any authority to issue orders of the character described. *Howard* v. *New York, New Haven, & Hartford Railroad, ante,* 370.

The exceptions to the exclusion of evidence which the defendant claimed tended to contradict one of its own witnesses cannot be sustained. *Corsick* v. *Boston Elevated Railway,* 218 Mass. 144, 147.

The effect of the hospital records as evidence only "as far as it relates to the treatment and medical history" of the plaintiff's case, was too strictly limited. The entire record as finally put in evidence by the plaintiff had this sentence, "Vomited fluid twice resembling coffee grounds & had an odor of whiskey." The defendant then offered that part of the record which earlier had been excluded, "had an odor of whiskey," on all grounds, meaning as we understand the offer that it bore upon the issue whether at the time of the accident the plaintiff was intoxicated. The final ruling was that "It may be admitted as far as it relates to the treatment and medical history of Mr. Bilodeau's case." The defendant in our opinion could properly contend that the odor of whiskey in the *vomitus* was evidence of the fact that it existed very shortly after the accident and arose from the plaintiff's use of whiskey before he boarded the car. *Leonard* v. *Boston Elevated Railway,* 234 Mass. 480.

While the testimony offered by the plaintiff at the close of the defendant's evidence was not strictly in rebuttal, the order in which relevant evidence shall be introduced is wholly within the discretion of the presiding judge, to the exercise of which exceptions will not lie. *Smith* v. *Paul Boyton Co.* 176 Mass. 217, 221. *McLean* v. *Paine,* 181 Mass. 287. But the testimony would not have been competent even if offered in chief, and should have been excluded. It was a successful and wholly unjustifiable at-

tempt to get before the jury, greatly to the defendant's prejudice, inadmissible, self-serving declarations of the plaintiff, that he was not drunk, nor under the influence of liquor on the night in question.

The cross-examination of a medical expert called by the defendant does not appear to have gone to the extent of attempting to show even indirectly that the defendant was insured, and the plaintiff properly could inquire whether the witness was in the general employment of the defendant or of the defendant's counsel. *Dempsey* v. *Goldstein Brothers Amusement Co.* 231 Mass. 461, 464.

Exceptions sustained.

JAMAICA POND GARAGE, INC. *vs.* WOODSIDE MOTOR LIVERY, INC.

Suffolk. December 7, 1920. — December 9, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Evidence, Of telephone conversation, Competency.

Where, at the trial of an action for motor vehicle hire, the plaintiff and the defendant both testify that the agreement of hiring was made in a telephone conversation between them, but they differ as to the amount agreed upon as hire, testimony of one who stated that he was present when the plaintiff was telephoning to the defendant and heard the plaintiff state as "all right" a rate, which was the rate which the plaintiff had testified that he had named, is not hearsay evidence and is competent and admissible.

CONTRACT upon accounts annexed for motor vehicle hire. Writ in the Municipal Court of the City of Boston dated December 12, 1919.

The judge of the Municipal Court found for the plaintiff and reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

The case was submitted on briefs.

L. Marks, for the defendant.

J. J. Norton, for the plaintiff.

BY THE COURT. An issue of fact in the trial court was the price agreed between the parties for motor vehicle hire. One Wolf-

son, agent of the plaintiff, testified that in telephone conversation with one Woodside, representing the defendant, $4 per hour was stipulated between them, while Woodside testified that the price was $3.50 per hour. A witness, having testified that he was present when Wolfson said he was telephoning with Woodside, then was permitted to testify that at that time he heard Wolfson say into the telephone "four dollars an hour is all right." In this there was no error of law. It was not hearsay evidence. It tended to confirm the testimony of Wolfson in part. Its weight depended upon the finding whether Wolfson's testimony to the effect that Woodside was at the other end of the telephone during that conversation was true; but that was wholly a question of fact. See *Commonwealth* v. *Wakelin*, 230 Mass. 567, 574, 575.

Order dismissing report affirmed.

PATRICK GLENNON'S (dependent's) CASE.

Suffolk. December 10, 1920. — December 11, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act, Injuries to which act applies. *Proximate Cause.*

Where, upon a claim by the widow of an employee under the workmen's compensation act, it appears that, while engaged in his employer's regular work, the employee was thrown violently from the seat of a wagon to the hub of a wheel and then to the curbstone, that, at the time when he received the injuries, he was suffering from pulmonary tuberculosis and that the injury, while not causing that disease, hastened its progress or excited it to a fatal termination, a finding is warranted that the employee's death was caused by injuries received in the course of and arising out of his employment.

CERTIFICATION, filed in the Superior Court under the provisions of the workmen's compensation act, of a decision of the Industrial Accident Board, finding that the death of Patrick Glennon while in the employ of Frank Jones Brewery Company "resulted from pulmonary tuberculosis caused by traumatism to his ribs and chest on April 25, 1918, this traumatism occurring while the employee was in the course of his employment, and

arising out of such employment," and awarding compensation to the claimant, the employee's widow.

In the Superior Court the case was heard by *Sisk*, J., by whose order a decree was entered in accordance with the decision of the Industrial Accident Board. The insurer appealed.

The case was submitted on briefs.

H. S. Avery, for the insurer.

F. S. Deitrick, for the claimant.

By the Court. The finding of the Industrial Accident Board was to the effect in substance that the death of the employee resulted from pulmonary tuberculosis induced by injuries to his ribs, chest and back, received by being thrown violently to the hub of a wheel and thence to the curbstone from the seat of the employer's wagon where he was engaged in his regular work, through the striking of the wagon by an automobile. This must stand if there was any evidence to support it. *Pass's Case*, 232 Mass. 515, and cases there collected. Manifestly there was personal injury arising out of and in the course of the employment. The only question is whether there was ground for the finding that the death resulted from that injury.

There was testimony tending to show that at the time of the injury the employee had pulmonary tuberculosis and that the injury while not causing this disease hastened its progress or excited it to a fatal termination. This was enough to warrant a finding against the insurer. The case is fully within the scope of *Madden's Case*, 222 Mass. 487, 493, and *Crowley's Case*, 223 Mass. 288.

Decree affirmed.

WELLINGTON PIANO CASE COMPANY *vs.* GARFIELD AND PROCTOR COAL COMPANY.

Worcester. September 27, 1920. — December 20, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Construction, Performance and breach. *Practice, Civil*, Exceptions. *Words*, "Fair proportion."

Where, under a contract for the sale of "thirty cars" of coal at a certain price per ton "at the mine," which provides that "the seller will not be responsible for the delivery of the same if prevented by . . . interruption of transportation or navigation, or from any cause or any occurrence beyond his control," the purchaser, at a time when no shipment by railroad can be made because of an embargo upon railroad transportation which was not the fault of the seller, gives an order for the shipment of a car, the seller is not required to make a shipment by water and cannot be held liable for damages resulting to the purchaser from his failing to do so.

Under the provisions of the contract and in the circumstances above described, the embargo on shipment by railroad excused the defendant from making a shipment while the embargo continued.

Where, at the hearing by a judge without a jury of an action of contract for damages resulting from failure of the defendant to make several shipments of coal, the judge was asked to rule generally that his finding should be for the defendant and refused the request and found for the plaintiff as to several breaches of the contract, an exception to the refusal of the request must be overruled if a finding for the plaintiff in any amount was warranted, although it appears that the judge's finding as to one of the breaches was erroneous.

A further provision of the contract above described, which was dated June 6, 1916, was that the purchaser would "take in a fair proportion of this coal prior to October 1." The seller knew that the capacity of the purchaser's bins was limited to four car loads. The purchaser was ready and willing to accept five car loads before October 1. The judge found that a "fair proportion" did not mean fifty per cent of the entire amount to be supplied under the contract, and that the five cars which the purchaser was ready and willing to receive was a "fair proportion" of the contract requirements. *Held*, that no error of law was shown in the finding and ruling.

In a bill of exceptions of the defendant in the action above described, it was stated that "all the material evidence is included herein." A general finding for the defendant would not have been warranted by the evidence reported. Certain subsidiary findings, which were favorable to the defendant, were unsupported by any evidence. There was a finding for the plaintiff. There were no errors of law, excepted to by the defendant, that affected the finding for the plaintiff. *Held*, that the defendant's exception must be overruled.

CONTRACT for breach of an agreement by the defendant to sell and deliver to the plaintiff thirty cars of coal. Writ dated February 1, 1918.

Copies of letters which formed the basis of the agreement were annexed to the declaration. Material portions of the letter of the defendant to the plaintiff under date of June 6, 1916, read as follows: "Confirming our Mr. Taylor's conversation with you yesterday, we have entered your order for thirty cars of our Thermit Bituminous coal at $1.75 per gross ton at the mine. We understand you will take in a fair proportion of this coal prior to October 1st." As a part of the letter were the following among other "Terms and Conditions": "When coal that has been ordered is not sent for or directed to be shipped within the time contracted for the shipper shall have the option of shipping it at current rates of freight, or cancelling such portions of the order as may not have been filled. . . . Every effort will be made for the prompt and faithful fulfilment of contracts, but the seller will not be responsible for the delivery of the same if prevented by accidents or other unavoidable occurrences on the railroads, strikes or combinations of miners, laborers or boatmen, accidents in the mines, or interruption of transportation or navigation, or from any cause or any occurrence beyond his control. In such cases the obligation to deliver coal under such contracts is thereby cancelled to an extent corresponding to the duration of such interruption, and no liability shall be incurred by the seller for damages resulting therefrom." Material portions of the plaintiff's reply to this letter under date of June 12, 1916, read as follows: "We acknowledge yours of the 9th inst. confirming our order given by your Mr. Taylor for Thermit Bituminous Coal, price $1.75 a ton at the mine. Thirty cars is approximately what we shall use, it will not be any more than that, and presume it will be a few cars less. As per conversation with Mr. Taylor we will arrange to have our bunks full by October 1st. We will do everything possible to give you advance notices, and shall expect you to ship promptly."

In the Superior Court, the action was heard by *N. P. Brown*, J., without a jury. Material evidence at the trial and facts found and rulings made by the judge are described in the opinion. There was a finding for the plaintiff in the sum of $1,255.91, and the defendant alleged exceptions.

In the bill of exceptions was the statement, "All the material evidence is included herein."

The case was submitted on briefs.

H. N. Berry & C. C. Bucknam, for the defendant.

C. F. Baker & E. W. Baker, for the plaintiff.

CARROLL, J. This is an action of contract to recover damages for the defendant's failure to deliver coal to the plaintiff at Leominster. On June 6, 1916, the defendant accepted the plaintiff's order for "thirty cars of our Thermit Bituminous coal at $1.75 per gross ton at the mine." The freight charges were $3.05 per ton, making the price at Leominster $4.80 a ton. The plaintiff, on June 26, 1916, and again on July 5, 1916, ordered one car. The defendant under these orders made shipments on August 14 and on August 21, 1916, railroad embargoes preventing earlier deliveries, and in consequence of this delay the plaintiff purchased coal in the open market at a total cost of $49.96 above the contract price. On January 6, 1917, the plaintiff directed the defendant to deliver four cars a month thereafter, none of which was received, and the plaintiff paid for seven cars purchased in the open market the sum of $1,091.78 in excess of the contract price. The case was heard by a judge without a jury and it was found that the plaintiff could recover these amounts with interest. Judgment was ordered for $1,255.91.

1. The first question to be disposed of is that of the damages allowed the plaintiff for delay in delivering the coal ordered on June 26, 1916, and on July 5, 1916. Thermit was a trade name for coal mined at certain mines not owned by the defendant. It was found that the railroad embargoes prevented the defendant from making said deliveries until August 14 and August 21, but that it was not beyond the power of the defendant to transport the coal by water, and on this ground the plaintiff recovered the item of $49.96 damages. The defendant had made no agreement to carry the coal by water. There was no evidence that the method of transportation originally agreed on was changed by subsequent agreement. The contract called for thirty cars at a certain price at the mine, and the order on June 26 and on July 5 was for a single car of coal. From such orders it was to be expected that the coal was to be shipped in railroad cars. It does not appear where the mines were located, and even if a shipment could be made there-

from immediately by water, it is manifest that deliveries could not be completed without to some extent relying on railroad transportation. Even if it were customary to carry coal in carload lots by water, there is nothing indicating that this method of transportation was contemplated. The contract provided that the defendant was not to be held for the prompt fulfilment of its requirements if transportation was interrupted, or "from any cause or any occurrence beyond his control." By letter dated July 21, 1916, the plaintiff stated its assumption that the defendant had facilities for furnishing coal by water. To this the defendant answered on the following day that on account of the high rates "of vessel freight, it is impossible to deliver coal in such towns as Leominster, except at a considerable advance over the delivered price on rail shipments and for this reason we cannot afford to ship coal in this way." While this letter was referred to by the plaintiff, it made no objection to the statement contained therein and gave no direction to send the coal by water. The transportation charges were to be paid by the plaintiff, but it gave the defendant no authority to ship by water, and it never assented to the additional expense involved in this mode of transportation. According to the understanding of the parties, as shown by the contract and correspondence, the coal was to be delivered in cars by rail, and it was not contemplated that it was to be carried otherwise or shipped by water.

The delay in delivering the coal was caused entirely by the railroad embargo; and without fault on its part the defendant was unable to carry out the contract. It is not contended that there was any delay in making delivery after the railroad embargo was removed. Even in the absence of a stipulation in the contract providing for the interruption of transportation, the defendant might contend that it was excused because the contemplated means of performance had become impossible, see *Rowe* v. *Peabody*, 207 Mass. 226, 232, 233, and cases cited, but we are not called upon to decide that question. In the case at bar the contract provided that no liability was incurred by the defendant for damages caused by delay in making deliveries where transportation was interrupted, "or from any cause or any occurrence beyond his control." The rights of the parties are to be governed by their agreement, which contemplated that coal was to be carried by rail, and not by

water; and when it became impossible to carry out this provision, the defendant could not be held for the resulting damages. It follows from this that the plaintiff was not entitled to damages for delay in making deliveries requested on June 26 and on July 5.

We have thought it proper to consider this question, and although we are of opinion that the conclusion reached by the judge on this branch of the case was erroneous, as the case is presented to us, we cannot correct the error; the attention of the court was not called to the matter now under discussion, the only request bearing on it being a general request for a finding for the defendant. As we think the plaintiff is entitled to recover damages for the failure to make deliveries in 1917, this general request was refused properly.

2. Orders for one car on October 9, October 24, November 16 and December 1, 1916, were sent and deliveries were made October 16, November 8, December 2, and January 4, 1917. On January 6, 1917, the plaintiff requested the defendant to ship four cars each month. None of these cars was delivered and in January, February and March, 1917, the plaintiff purchased in the open market seven cars of coal for which it paid $1,091.78 in excess of the contract price, and damages in this amount were allowed. In the findings of the judge it is stated that none of the coal ordered in January was delivered because, among other reasons, of the railroad embargo then existing. The contract contemplated a shipment by rail and if it were a fact that a railroad embargo prevented the use of this means of transportation, then the defendant was excused from performance, and the plaintiff could not recover for this failure to furnish the coal ordered in the year 1917. We are, however, unable to find any evidence that during the year 1917 there was a railroad embargo. The record purports to contain all the material evidence; and so far as appears there is nothing bearing on this question except that there was "no embargo after August 2." Considering this date as stated in the record, in connection with the correspondence and the finding of the court with reference to the delay in making deliveries in 1916, we understand it refers to the year 1916, and therefore, according to the record, there was no railroad embargo in the year 1917 which prevented the defendant from delivering the coal ordered during that year; the finding

that the plaintiff could recover this item was in accordance with the evidence.

The contract provided that the plaintiff would "take in a fair proportion of this coal prior to October 1st." The defendant contended that a "fair proportion" meant fifty per cent of the entire amount to be furnished, and as the plaintiff was supplied with five cars prior to October 1, 1916 (two of which were delivered by the defendant and three purchased by the plaintiff in the open market), the entire amount that the defendant was required to deliver after October 1, was five cars, four of which had been delivered. The defendant knew that the capacity of the plaintiff's bins was limited to four cars. The judge found that a "fair proportion" of the coal to be delivered before October 1 did not mean fifty per cent of the entire amount to be supplied under the contract, and that the plaintiff was ready and willing to accept prior to October 1, five cars, which number was a fair proportion of the contract requirements. Taking all the circumstances into account and considering all the evidence, there was no error of law in finding that this contention of the defendant was without merit.

Terms of payment were "cash thirty days from date of bill." The plaintiff has never paid for the cars shipped on December 2, 1916, and on January 4, 1917. The defendant contends that the failure to make these payments was a material breach of the contract, which excuses it from further performance. On this branch of the case the judge found that the refusal of the plaintiff to pay for the cars shipped on December 2, 1916, and January 4, 1917, after repeated demands for payment, was a breach of the contract; and that the relations of the parties continued unchanged until April 25, 1917, when the plaintiff refused to pay for the shipments of December 2 and January 4 on the ground that it was holding the sum due "as an offset to what it claimed the defendant owed it on account of excess cost of purchasing coal in the open market."

The record is entirely bare of any suggestion that payment was at any time demanded or refused. The plaintiff from the beginning was ready and willing to carry out the contract according to its terms. It insisted that thirty cars of coal should be delivered, and refused to accept the defendant's construction of the contract. As late as December 28, 1916, in a letter to the defendant, it stated its demand that every car should be shipped as

agreed, and on the following day called the defendant's attention to the delay and stated that it would look to the defendant for damages if the contract was not lived up to. In August, 1916, the defendant notified the plaintiff that no deliveries would be made after October 1 in excess of the amount delivered prior to that date; and in September it gave this same excuse for refusing to fulfil the contract. The last car was shipped on January 4, 1917. On January 9 the defendant repudiated the contract and refused to be bound by it, relying on its construction of the contract that it had already shipped four cars and would within a short time ship the fifth and last car. The plaintiff replied to this letter on January 11, 1917, again insisting on the performance of the contract and requesting a shipment of four cars a month. It does not appear that after this letter of January 11 there was any further correspondence or negotiations between the parties, and the defendant did not at any time deliver the "fifth and last car" referred to in the letter of January 9.

The correspondence shows that no demand for payment was made at any time. The defendant's only excuse for not carrying out the contract was the railroad embargo and that under the contract only five cars were to be delivered after October 1. It never based its refusal to perform on the ground that the plaintiff refused to pay, and there is nothing in the record to show that "repeated demands for payment" were made or that on April 25, 1917, the plaintiff refused to pay on the ground that it was withholding payment as an "offset to what it claimed the defendant owed it." There is nothing in the reported evidence indicating that complaint was ever made of the plaintiff's failure to pay for any of the shipments. The judge gave the twenty-third and twenty-fourth requests of the defendant, to the effect that the plaintiff's refusal to pay for the shipments of December 2 and January 4 or either of them was a material breach of the contract. But in his statement of findings of fact, he states that the refusal to pay for the cars shipped December 2 and January 4, after repeated demands, was "without legal justification and constituted a breach of the contract which entitled the defendant to repudiate any obligation thereafter to furnish the plaintiff any coal . . . which it did." As we construe this finding, there was no default of payment until thirty days after the shipment of

January 4. Even if this finding could be construed to mean that the mere failure or neglect of the plaintiff to pay for the car shipped on January 4 was of itself a material breach of the contract, the finding was not warranted by the evidence. On January 9, before payment was due on the shipment of January 4, the defendant positively refused to carry out the contract according to its terms. It also refused to supply the car which in the letter of January 9 it promised to deliver. The judge found that the defendant "diverted the said car" which was then in transit. The defendant's letter of January 9 was in reply to the plaintiff's letter of January 6 ordering four cars a month. The defendant not only refused to comply with that request and carry out the contract in conformity with its true intent, but refused to comply with the contract according to its own interpretation of it. As the contract had been finally repudiated by the defendant both by letter and conduct before payment was due, it could not be found that the failure of the plaintiff to pay excused the defendant from performing the contract. See *Ballou* v. *Billings*, 136 Mass. 307; *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 377.

The right of the defendant to recover for the deliveries in December and January does not appear to have been raised in these proceedings. As we have said, there was not, according to the evidence reported, any railroad embargo preventing the delivery of coal after August 2, 1916. The plaintiff was entitled to receive the amount of coal ordered, and as there was no material breach of the contract on its part, we see no reason why it should not recover. Although there was error in allowing damages for delay in deliveries during the year 1916, when a railroad embargo prevented shipment by rail, the point was not raised at the trial and is not now open to the defendant. Other errors which have been pointed out do not seem to us to affect the final conclusion of the trial judge. *Davis* v. *Boston Elevated Railway*, 235 Mass. 482. The plaintiff could recover for the defendant's neglect to supply the coal ordered in the year 1917, and the judgment in its favor must stand. There was no error in refusing the defendant's requests.

Exceptions overruled.

NELLIE S. COLEMAN, executrix, *vs.* NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY & others.

Suffolk. October 20, 1920. — November 29, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Insurance, Life: assignment of policy, surrender of policy. *Evidence*, Extrinsic affecting writings. *Words*, "Anniversary of issue."

A policy of life insurance was dated April 17 of a certain year, was delivered to the insured on April 18 and by its terms provided for the payment of premiums annually on May 1. An assignment in writing of the policy, after by its provisions it had become a "paid-up policy," gave to the assignee a right to surrender the policy for its surrender value "at any anniversary of issue." *Held*, that the meaning of the words "anniversary of issue" was not clear from the documents themselves, and must be interpreted in the light of all the circumstances attending their use.

It appeared that the assignment above described was upon a printed blank furnished by the insurance company for general use by its policy holders; that the contract of insurance did not come into being until the payment of the premium and the delivery of the policy; that the date of the payment of the premium was the date as of which the value of a paid-up policy was computed; that the schedule of cash surrender values of the policy, which appeared upon the policy, was computed as of the date of the payment of the premium, and that all mathematical and actuarial calculations as to the policy had to be made as of the date of the payment of the premium. *Held*, that the words in the assignment, "anniversary of issue," meant May 1.

BILL IN EQUITY, filed in the Superior Court on November 8, 1916, by the executrix of the will of George D. Coleman against the New England Mutual Life Insurance Company and Amos Wakelin and Henry W. Marston, copartners, for an accounting as to the proceeds of a policy of insurance issued by the defendant company upon the life of the plaintiff's testator.

The suit was heard by *Jenney*, J., a commissioner having been appointed under Equity Rule 35 to take the testimony. Facts found by the judge are described in the opinion. By order of the judge a final decree was entered dismissing the bill; and the plaintiff appealed.

C. A. Warren, (*W. Howland* with him,) for the plaintiff.

G. Hoague, for the defendants.

DE COURCY, J. The defendant insurance company delivered to George D. Coleman on April 18, 1900, its policy insuring his life in the sum of $5,000, payable at his death to his wife, Augusta D. Coleman, and, in the event of her prior decease, to the insured's estate. The policy was dated April 17, 1900, but by its terms the premiums were payable annually for twenty years on the first day of May. The interest of Augusta D. ceased on her death, April 1, 1909. By reason of the non-payment of the premium due May 1, 1911, said policy in accordance with its terms and by virtue of the non-forfeiture statute applicable thereto (St. 1894, c. 522, § 76), became a paid-up policy as of May 1, 1911, for $2,303, payable to his estate at his death.

Coleman borrowed $1,100 from the insurance company on March 29, 1913, pledging the policy as collateral security for the repayment of the loan with interest. On July 15, 1913, he borrowed $75 from the defendants Marston and Wakelin, giving them his note payable in thirty days and an assignment of all his right, title and interest in the policy as security. They were informed by the company that the total cash surrender value of the policy as of May 1, 1914, was $1,189.39. Instead of paying the note as requested, Coleman sent to Marston a new thirty days note for $75 dated August 15, 1913. This note was never paid, although payment was repeatedly demanded.

On November 6, 1913, Marston and Wakelin forwarded to the insurance company their assignment of the policy, together with a draft of $1,112.67 in payment of the insurance company's loan to Coleman. They received from the company the original loan certificate and policy, thus acquiring and succeeding to all the company's rights under its pledge from Coleman. On April 28, 1914, Marston, seeing that the cash surrender value of the policy in question was being eaten up by the interest upon the two loans, applied to the insurance company for a surrender value receipt. On April 30, 1914, having received from the company the papers necessary in order to obtain a surrender, Marston wrote to the insured notifying him that unless he received some word at once he would be compelled to surrender the policy in part payment of the loan. Coleman paid no attention to this notice. On May 6 the policy and surrender receipt were forwarded to the company and on May 8 a draft for $1,208.84 was sent to Marston and

Wakelin in payment of the cash surrender value of the policy and the reversionary additions thereto. This was $17.89 less than the amount due them from Coleman. In subsequent correspondence with the insurance company, Coleman contended that the amount paid to the assignees was less than the cash surrender value. He made no claim therein that the policy had been surrendered on the wrong date, or that May 1 was not the proper date for the computation of the cash surrender value. The insured died on January 14, 1915. The plaintiff, as executrix of his will, seeks in this suit to recover the full value of the paid-up policy at the time of his death ($2,303) less the indebtedness due to the defendants; claiming that under the terms of the policy and the assignment Marston and Wakelin had no authority to surrender the policy when they did. At the trial she conceded that it made no difference whether the policy was surrendered on May 1 or May 8; but claimed that April 17, the date appearing on the face of the policy, was the only date on which it could be surrendered.

The assignment gave to Marston and Wakelin the right to surrender the policy "at any anniversary of issue," and to receive the cash surrender value thereof. Ordinarily by the "issue" of an insurance policy is meant its delivery and acceptance whereby it comes into full effect and operation as a binding mutual obligation. *Homestead Fire Ins. Co.* v. *Ison*, 110 Va. 18, 23. *Logsdon* v. *Supreme Lodge Fraternal Union of America*, 34 Wash. 666. Sometimes it is used in the sense of the preparation and signing of the instrument by the officers, as distinguished from its delivery to the insured. See *Dargan* v. *Equitable Life Assurance Co.* 71 S. C. 356, 361; *Kansas Mutual Life Ins. Co.* v. *Coalson*, 22 Tex. Civ. App. 64, 73; *Stringham* v. *Mutual Ins. Co.* 44 Ore. 447. In the assignment under consideration, while the parties are at issue as to the meaning of the word as used by them, they reject both these interpretations, as not being in accord with their intention. It is insisted on the part of the plaintiff that by "anniversary of issue" was meant the anniversary of the date of the policy. The defendants, on the other hand, contend that the date contemplated is May 1, which was the time fixed for the annual premium payment, and the date as of which the policy became a paid-up one. We can determine the meaning which the parties put upon this

doubtful language only by applying it in the light of the circumstances in which the assignment was executed and the facts to which it related.

The parties did not formulate this particular contract, but used one of the general forms furnished by the insurance company for use when policies were to be assigned as collateral security. The words in question, "at any anniversary of issue," were part of the printed blank. The language was chosen by the company for general use by its policy holders, and presumably with a view to uniformity and convenience in dealing with cash surrender values. If it were deemed desirable to select the date of the policy as determining the time a policy might be surrendered for its cash value or paid-up insurance, presumably "date" and not "issue" would have been inserted in the assignment blank. Further, the date was not of vital importance. In accordance with the terms of the application there would be no contract of insurance until the premium was paid and the policy delivered. For many and various reasons this was likely to be subsequent to the date when the policy is sent out from the home office. So, too, the date of delivery, uncertain and unrecorded, probably would not be selected as the time fixing the rights of the policy holder on surrender of his policy. The important date is that when the annual premium was payable, as of which the value of a paid-up policy was computed.

The parties here were dealing with a paid-up policy, whose value was computed as of May 1, 1911. The "anniversary of issue" referred to in their assignment was material only with reference to the surrender of that policy before maturity, and receiving the value thereof. On the original policy that value, computed in accordance with the provisions of the statute, was fixed as of May 1; and a schedule of the cash surrender value as of that date each year until maturity was set forth in the policy. The annual premium was payable on May 1; and its payment carried the policy to May first of the ensuing year, regardless of when it was signed or delivered. It necessarily followed that all mathematical and actuarial calculations had to be made as of that date in each year, by the insurance department of the Commonwealth and by the insurance company. The net values computed were those at the end of the year, calculated as of the

said premium date. As found by the trial judge, "The policy in question was valued by annual periods in accordance with mortality tables contemplating a year's insurance, the date taken was the date between which the insurance is in force, namely, from the time when the first premium was paid up to the time when the policy would run out by reason of the expiration of one year — in this case the date taken was the first of May." And "Whether the contract between the parties subsequent to May 1, 1911, be called a new 'statutory policy' or a modification of the original policy, the insurance covered by it started to cover the risk in the new amount of $2,303 on the first day of May and this was the only date of any mathematical or actuarial significance in connection with this policy at any time." These facts must have been known to Marston and Wakelin, who were general agents of said insurance company in Philadelphia; and the insured had earlier experience in adopting the same form of assignment.

It is not clear what the parties meant by the language in question. But in view of what they were attempting to do, and the attendant circumstances, we cannot say that the trial judge was plainly wrong in finding that May 1 was "the 'anniversary of issue' referred to in the assignment" and that "the policy was properly surrendered." See *McDougald* v. *New York Life Ins. Co.* 146 Fed. Rep. 674; *Wilkie* v. *Insurance Co.* 146 N. C. 513.

Decree affirmed.

CONRAD RENO *vs.* JAMES E. COTTER & others.

Hampden. September 23, 1920. — January 3, 1921.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Equity Pleading and Practice, Report, Appeal, Decree, Bill, Amendment. *Superior Court. Jurisdiction. Equity Jurisdiction*, Accounting, To reach and apply assets not attachable at law.

Where, after having attempted to report a suit in equity upon the bill and a demurrer without making any ruling as to the demurrer, a judge of the Superior Court files a second report in which he states that he "made an order sustaining" the demurrer and reports that ruling to this court for determination, the

second report must be taken to have revoked and superseded the first, although it did not expressly so state.

Upon an appeal, without a report of evidence, from an order by a judge of the Superior Court, which denied a motion of the plaintiff in a suit in equity to discharge a report to this court, filed more than one and one half years before by another judge, of a ruling sustaining a demurrer to the original bill and also denied a motion by the plaintiff to amend his bill and allowed motions of the defendant to discharge the report and that judgment be entered for the defendant, the order, so far as it involves a finding of fact, must stand.

It seems, that a decision in writing, signed by a judge of the Superior Court, stating that he allowed a motion of the defendant in a suit in equity that a report to this court by another judge of a ruling sustaining a demurrer to the bill be discharged, may be treated as an interlocutory decree.

The failure of the plaintiff in a suit in equity for a year and one half to enter in this court a report by a judge of the Superior Court of a ruling sustaining a demurrer to the bill is abundant reason for allowing a motion by the defendant that the report be discharged.

Upon an appeal in a suit in equity from a final decree which, besides dismissing the bill, included several matters which already had been the subject of interlocutory orders and decrees, the correctness of the disposition made of such interlocutory matters is open for consideration.

A judge of the Superior Court who heard a demurrer to a bill in equity filed a report to this court in which he stated that he sustained the demurrer, but no formal decree to that effect was entered. A motion by the defendant that the report be discharged for failure of the plaintiff to enter it in this court was allowed a year and a half later. Subsequently a motion by the defendant for the entry of a formal decree sustaining the demurrer on the ground that the matter already had been decided by the first judge was allowed by a second judge as of the date of the filing of the report by the first judge. Upon an appeal from such decree, where the record did not include a report of evidence, it was *held*, that

(1) It was not essential that the motion be decided by the same judge who filed the report;

(2) Although the report was discharged, it was proper to resort to it for any rightful purpose;

(3) The statement in the report by the first judge that he had made an order sustaining the demurrer was a sufficient foundation for the subsequent entry, *nunc pro tunc*, upon the order of the second judge, of an interlocutory decree to that effect;

(4) So far as the decree included a recital of facts, it must stand, no evidence being reported;

(5) So far as the decree included a ruling of law, it was within the jurisdiction and power of the court and was warranted.

Where a judge of the Superior Court files a report in a suit in equity reciting that he had made an order sustaining a demurrer to the bill, but it appears that he had not formally entered such an order, and later, by order of another judge, an interlocutory decree sustaining the demurrer is entered as of the date of the filing of the report by the first judge, a motion of the plaintiff that the report be discharged on the ground that there was no ground for the report because when it was filed the judge had not made an order sustaining the demurrer, properly may be denied.

The allegations of a bill in equity by an attorney at law against two other attorneys and a third defendant were that the plaintiff and one defendant entered into a business arrangement, not a partnership agreement, for the practice of law, whereby the plaintiff was to receive a percentage of fees received by that defendant, and there were recited a number of specific matters of litigation which were subject to the arrangement. There also were allegations that, without a definite arrangement as to compensation, the plaintiff rendered valuable services to both the defendants who were attorneys at law in connection with other litigation for the third defendant; and there were paragraphs appropriate to a bill to reach and apply to the payment of sums alleged to be due to the plaintiff property of the defendant attorneys in the hands of their client. *Held*, that the bill was founded upon distinct and separate causes of action which had no connection with each other, and was multifarious; and that demurrers thereto on that ground should be sustained.

The disposition of a motion to amend a bill in equity rests in the sound judicial discretion of the court.

The disposition of a motion of the plaintiff, in the suit above described, to strike out the client as a party defendant and to divide the bill, leaving in only allegations applicable to a joint claim against the two defendants who were attorneys at law, lies in the sound judicial discretion of the court.

The proper office of a supplemental bill in equity is to support a ground of suit, existing when the original bill was filed, by facts occurring since the filing of the original bill and coming to the knowledge of the plaintiff subsequent thereto.

BILL IN EQUITY, filed in the Superior Court on February 11, 1915, against James E. Cotter, James W. McDonald and William J. Lowrie for accountings by the defendant Cotter and by the defendant McDonald for sums alleged to be due from each of them to the plaintiff by reason of payments made to them for professional services rendered by them and the plaintiff in matters described in the opinion, and to reach and apply, in payment of amounts found due on such accountings, certain alleged rights of the defendants Cotter and McDonald arising out of litigation carried on by them for the benefit of the defendant Lowrie. The allegations of the bill are more particularly described in the opinion.

The suit was heard in successive stages in the Superior Court by *King, Fox, Wait, J. F. Brown, N. P. Brown, & Lawton*, JJ., respectively. The proceedings are described in the opinion. From a final decree ordering, among other things, that the bill be dismissed, the plaintiff appealed.

The case was submitted on briefs.

C. Reno, pro se.

J. P. Fagan & J. W. McDonald, for the defendants Cotter and McDonald.

RUGG, C. J. This suit in equity was filed on February 11, 1915. The record is confused and it is necessary to state it in some detail. The defendants Cotter and McDonald, who hereafter will be called the defendants, filed separate demurrers. These were heard and on November 9, 1915, without deciding the demurrers, the judge filed what is in form a report to this court of the questions thereby raised. On March 4, 1916, another report was filed by the same judge, wherein it was stated that he "made an order sustaining the demurrers," and then reported the correctness of his rulings upon certain stipulations. The first report did not conform to R. L. c. 159, § 27, as to reporting interlocutory matters in equity. Doubt well may have arisen in the mind of the judge as to his power to report a demurrer in equity without first deciding it, and hence the second report was made, which on its face showed a decision upon the demurrers. It must be assumed that the first report was in effect superseded by the second, which is more full and conforms to R. L. c. 159, § 27. Two reports cannot be made rightly of the same question and both be outstanding at the same time. By making the second report the first was revoked even though not expressly so stated. On July 24, 1917, the plaintiff filed a motion to amend his complaint, and on July 30 a motion to discharge the reports. On September 11, 1917, more than one and one half years after the filing of the last report, each defendant filed a motion to discharge the reports for failure seasonably to enter them in the Supreme Judicial Court and for an order affirming the order sustaining the demurrers and for judgment thereon. These three motions were heard together by another judge. In February, 1918, his decision was filed. In it, after denying the plaintiff's motions and after making a finding that no action had been taken looking to the entry of the report in this court, he allowed the defendants' motions that the report be discharged and that judgment be entered for the defendants upon the order sustaining the demurrers. So far as that decision involved a finding of fact, it must stand as final on familiar principles, since no evidence is reported.

No formal decree was entered by this judge pursuant to his decision. He filed, however, a signed statement or decision to the effect among other matters that the defendants' motions that the report be discharged were allowed. There is authority to the

effect that an order of this nature is equivalent to an interlocutory decree. *Nelson Theatre Co.* v. *Nelson*, 216 Mass. 30, and cases collected at page 33. In connection with the entry of the final decree expressly discharging the report, the report is deprived of any efficacy to bring the case here.

It is plain that the report was discharged rightly, and that neither report is now before us. The lapse of so long a time without action by the plaintiff to enter the report was abundant reason for discharging it. *Griffin* v. *Griffin*, 222 Mass. 218.

It follows that the case is not before us on report.

Numerous motions by each of the parties are printed in the record, together with the decisions of the several judges who made them. No appeal, however, was taken from any interlocutory order or decree. A final decree dismissing the bill was entered, from which the plaintiff appealed. The case never has been referred to a master nor heard on its merits. Hence no facts are found. No evidence concerning any interlocutory matter is printed.

The final decree includes numerous matters which had been the subject of interlocutory orders and decrees. These matters included in the final decree are open for consideration. Interlocutory decrees, not appealed from, are open to revision only to the extent that the final decree is affected thereby. R. L. c. 159, § 26. *Houle* v. *Abramson*, 210 Mass. 83, 84. *Fay* v. *Corbett*, 233 Mass. 403, 410.

A motion was filed by the defendants on May 11, 1918, that an order be entered as of a date prior to March 4, 1916, sustaining the defendants' demurrers on the ground that by mistake or oversight an order to that effect did not formally appear of record, although from the report of the judge filed on March 4, 1916, it was apparent that such an order actually was made. This motion was heard by a third judge. He allowed the motion and a decree *nunc pro tunc* was entered accordingly. It was not essential that this motion be decided by the same judge who made the report. Proper practice permitted it to be heard by a different judge. The Superior Court is a court of general jurisdiction. The case was pending in the Superior Court. Any judge of that court sitting for the judicial administration of justice had power to take cognizance of any motion or other matter pending for decision. *Catheron* v. *County of Suffolk*, 227 Mass. 598, 602. These motions

were not like a bill of exceptions, motion for new trial, or other step in procedure requiring the personal attention of a particular judge because begun and remaining uncompleted by him. *Brooks* v. *Shaw*, 197 Mass. 376.

The reports, although discharged and hence of no effect so far as concerns bringing before this court for decision the questions there set forth, were still on the files of the Superior Court, to which resort could be had for any rightful purpose. A report of this kind in equity recognized by the statute becomes a part of the record. *Stone* v. *St. Louis Stamping Co.* 156 Mass. 598. It is not necessary to determine whether under these circumstances resort might be had to a finding of facts or amplified decision filed by the judge in an action at law which, speaking strictly, are not part of the record. See *Cressey* v. *Cressey*, 213 Mass. 191; *Crocker* v. *United States*, 240 U. S. 74, 78, and *Parker* v. *Framingham*, 8 Met. 260, 264. It is apparent from the terms of the report dated March 4, 1916, that the judge signing it had made an order sustaining the demurrers. It is expressly so stated. Such an order might have been oral with the expectation that it would be entered on the docket. It should have been made by an interlocutory decree or separate order. But it was stated in a writing signed by the judge, which was sufficient foundation for the subsequent entry of an interlocutory decree embodying its substance.

The interlocutory decree, reciting that it appeared that an order sustaining the demurrers had been made by the first judge, which by mistake or oversight did not formally appear upon the records, and sustaining the demurrers as of March 3, 1916, so far as it involved a finding of fact, must stand since no evidence is reported. So far as it involves a ruling of law, it was right on the facts recited because it simply made the record of the court conform to the truth. The power of the court was ample in this particular. *Waucantuck Mills* v. *Magee Carpet Co.* 225 Mass. 31, 33. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 387. *Farris* v. *St. Paul's Baptist Church*, 220 Mass. 356. *Maggelet's Case*, 228 Mass. 57, 63. *Hathaway* v. *Congregation Ohab Shalom*, 216 Mass. 539, 542.

It was within the jurisdiction of the court to enter *nunc pro tunc* the interlocutory decree sustaining the demurrers. *Perkins* v. *Perkins*, 225 Mass. 392.

The denial of the motion of the plaintiff to set aside this decree and the proceedings antecedent to it presents no question of law.

The result is that as the record stands, as matter of correct practice, the demurrers have been sustained by an interlocutory order. The demurrers were sustained also in the final decree. The name of the judge who ordered the final decree to be entered is not stated explicitly, but apparently was a fourth judge. As has been pointed out, it is of no consequence whether he was the same one who first ordered that the demurrers be sustained or a different one.

The plaintiff contends that his motion to discharge the report ought to have been granted on the ground that there had been no order of the first judge sustaining the demurrers, and hence no ground for report. Whatever might have been the merit of this contention if no other motions had been pending, it is plain that, after the disposition of the motions of the defendants to which reference has just been made, the plaintiff's motion was denied rightly.

The denial of the plaintiff's motion to amend and then dismiss the report on February 20, 1919, presents no question of law.

We proceed to consider the merits of the demurrers. In one paragraph of the bill there is set out in substance a business arrangement entered into between the plaintiff and the defendant Cotter for the joint practice of the law. No partnership is alleged, for there was to be no division of expenses or losses. The plaintiff was to receive simply a percentage on fees received by Cotter. A number of cases are enumerated as being subject to this arrangement, on which the plaintiff is entitled to a division of fees. In other paragraphs of the bill it is alleged in considerable detail that without a definite arrangement as to compensation the plaintiff rendered valuable services to both defendants in connection with specified litigation with paragraphs appropriate to a bill to reach and apply property in the hands of their client.

It thus appears that several claims are alleged to be against the defendant Cotter alone, and that one claim is alleged against both the defendants. There is no allegation that the two defendants are partners or have any joint relation except in connection with the one litigation. Thus the bill is founded upon entirely distinct and separate causes of action, which have no connection with each other. It joins as defendants two persons, one of whom has no

relation whatever to the important claims of the plaintiff alleged against the other defendant. There is nothing about the several matters alleged in the bill which shows that they should be tried together or which overcomes the natural inference that they ought not to be tried together. No fiduciary relations are set out. No fraud is averred, an element which often binds together apparently diverse subjects. *Hutchins* v. *Nickerson*, 212 Mass. 118, 122. The causes of action against the defendant Cotter and that against both defendants seem to be appropriate subjects for several actions at law. While there is no inflexible rule as to what constitutes multifariousness, and each case must depend largely on its own circumstances, the case at bar plainly is open to that objection. The demurrers were rightly sustained. *Davis* v. *Peabody*, 170 Mass. 397. *Mesisco* v. *Giuliano*, 190 Mass. 352. *Saltman* v. *Nesson*, 201 Mass. 534, 539. *Sylvester* v. *Boyd*, 166 Mass. 445. *Keith* v. *Keith*, 143 Mass. 262. *Ricker* v. *Brooks*, 155 Mass. 400. The case at bar is distinguishable from cases like *Coram* v. *Davis*, 209 Mass. 229, *Lovejoy* v. *Bailey*, 214 Mass. 134, 151, and *Garden Cemetery Corp.* v. *Baker*, 218 Mass. 339, 342.

The question whether the motions of the plaintiff to amend his bill should be allowed rested in sound judicial discretion. There is nothing on this record to show abuse of that discretion in denying them. *Merchants' Bank of Newburyport* v. *Stevenson*, 7 Allen, 489, 491. *Tufts* v. *Waxman*, 181 Mass. 120. *Drew* v. *Beard*, 107 Mass. 64, 76.

The plaintiff's motion to divide his bill by including in this suit only allegations applicable to a claim against the defendants Cotter and McDonald jointly, and by filing a new bill against Cotter alone as of the date of the commencement of this suit and to strike out Lowrie as a party defendant also was addressed to the discretion of the judge to whom it was presented. It is to be noted that this motion contained numerous recitals necessarily at variance with facts which must have been found by one or more judges of the Superior Court before certain orders could have been made. The denial of this motion after hearing shows no error of law affecting the final decree. *Parsons* v. *Henry*, 197 Mass. 504, 511.

There was no error in refusing to the plaintiff the privilege of filing a supplemental bill. The proper office of such pleading is to support a cause of action existing when the original bill was

filed by facts occurring since the filing of the bill or coming to his knowledge subsequent thereto. The same matter under our practice may be pleaded by amendment. Equity Rule 25. *Malden & Melrose Gas Light Co.* v. *Chandler*, 220 Mass. 1, 9. *Bartlett* v. *New York, New Haven, & Hartford Railroad*, 226 Mass. 467, 471. *Pedrick* v. *White*, 1 Met. 76. Since there was no error in sustaining the demurrers, there was no error in refusing to allow the filing of the supplemental bill.

Decree affirmed with costs.

ATTORNEY GENERAL *vs.* CITY OF METHUEN.

Essex. September 17, 1920. — January 4, 1921.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Quo Warranto. Attorney General. Municipal Corporations, Validity of charter. *Constitutional Law*, Incorporation of town as city. *General Court. Jurisdiction. Practice, Civil*, Parties.

An information in the nature of a quo warranto may be brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and prerogatives of a municipal corporation have been usurped.

In a proceeding of the character above described in which it is alleged that a statute incorporating a town as a city was invalid because contrary to art. 2 of the Amendments to the Constitution, the municipality nominally and in fact exercising the franchises and prerogatives alleged to have been usurped may be made the party defendant.

The General Court under art. 2 of the Amendments to the Constitution has no jurisdiction to constitute a city government in a town unless and until its action to that end is sought by the inhabitants of the town who have signified their consent to such application being made by vote at a meeting of the town called under a written warrant, setting out in fairly intelligible language the subject or subjects to be acted upon by the voters and signed by the selectmen or, in the event of their unreasonable refusal to sign, by a justice of the peace, and served by the constable or other designated person.

Subsequent approval or ratification by a town, at a meeting "duly warned and holden," of action of the General Court purporting to constitute it a city without the making of the precedent application in accordance with the request or consent of the voters required by art. 2 of the Amendments to the Constitution, will not validate such action.

At an annual town meeting of the inhabitants of Methuen, the warrant for which contained no notice that the subject of a change in the form of town government would be considered, a committee was appointed to investigate the advisability

of changing the town's form of government. At the next annual meeting, under an article in the warrant, "to hear reports of committees and to act thereon," that committee reported, recommending that an application be made to the Legislature for a limited town meeting form of government. Such an application was made and Spec. St. 1916, c. 116, was enacted and was duly accepted by the town. *Held*, that, in such proceedings the requirements of art. 2 of the Amendments to the Constitution were not fulfilled, so that a contention to the effect that the form of town government was so changed that a further change by the enactment of Spec. St. 1917, c. 289, without observance of the requirements of art. 2 of the Amendments to the Constitution, was valid, had no relevancy.

A vote of a public meeting in the town hall of Methuen, called by a published notice signed by the chairman and the clerk of the joint committee on cities of the Legislature and addressed to persons interested in a bill then pending to institute a city government in the town, which was favorable to the enactment of the bill, was not an application for such action to the General Court by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by art. 2 of the Amendments to the Constitution, it not appearing that the meeting was called as a town meeting, that any town officer functioned at the meeting, that a check list of voters was used or that records were kept by the town clerk.

While the principles, that no laches can be imputed to the government and against it no time runs so as to bar its rights, and that estoppel does not apply ordinarily against the exercise of a public right, the interests of the Commonwealth usually being held not to be prejudiced by the failure of public officers to do their duty, apply to quo warranto proceedings instituted by the Attorney General on behalf of the Commonwealth, the granting of relief in such proceedings, even when sought at the instance of the Attorney General in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion.

In an information in the nature of a quo warranto, it was alleged that the proceeding was brought by the Attorney General "in behalf of the Commonwealth and at the relation of" an individual citizen and the prayer was in the form, "Wherefore, the Attorney General upon relation of" the citizen "as aforesaid, prays . . ." The informant's brief before this court was signed by the Attorney General and by one of his assistants and also by counsel for the relator. The only oral argument in behalf of the informant in this court was made by counsel for the relator. *Held*, that

(1) The permission given to the counsel for the relator to argue in support of the Attorney General's information must not be taken as a precedent;

(2) The validity of a city charter cannot be assailed in this form of proceeding by one who has only the standing of a private citizen;

(3) An information of this nature must be presented by and on behalf of the Commonwealth and by and under the immediate supervision of the Attorney General, and in that way alone;

(4) If the name of the relator be rejected as surplusage, enough remained in the record to show that the information was filed by the Attorney General in behalf of the Commonwealth.

Where, more than three years and two months after the approval by the Governor of Spec. St. 1917, c. 289, purporting to constitute a city government in the town of Methuen, and more than two years and five months after the inauguration of a city government upon the supposed authority of the statute, the Attorney

General, whose attention then for the first time was called to the matter by a private citizen of Methuen, filed an information in the nature of a quo warranto based upon allegations that the statute was invalid because the requirements of art. 2 of the Amendments to the Constitution were not observed, this court, while determining that the statute was invalid, *held* that, in the circumstances, granting the relief sought would not be a discreet exercise of judicial power nor in conformity to the general public interest.

INFORMATION in the nature of a quo warranto, brought by the Attorney General "in behalf of the Commonwealth and at the relation of Charles W. Mann" and filed in the Supreme Judicial Court for the county of Essex on July 8, 1920, against the "City of Methuen," praying for "the advice of this court in the premises and for proper process to be issued to command the said municipal corporation of Methuen to answer by what warrant it claims to have, use and enjoy the corporate powers, privileges and franchises aforesaid, and for such other relief in the premises as justice may require."

The facts were agreed upon and were substantially as follows:

Previous to the enactment of Spec. St. 1916, c. 116, Methuen was a town. That statute provided for precinct voting and a limited town meeting in the town and became effectual upon its acceptance by the town at a special election on July 29, 1916. In 1915, Methuen by the State census had more than fifteen thousand inhabitants and at all times since has had more than twelve thousand inhabitants.

On January 29, 1917, William L. Stedman, Samuel Rushton and David D. Woodbury, who then constituted the board of selectmen of Methuen, filed with the General Court a petition, signed by them under the title "Board of Selectmen" and reading: "The undersigned, citizens of Massachusetts, respectively petition for the incorporation of the town of Methuen as a city under such charter or plan of government as the voters of said town may by their votes prefer." No town meeting was ever "duly warned and holden" previous to such application for the purpose of voting thereon and no inhabitants of the town held any meeting in the town, called or warned in accordance with the provisions of St. 1913, c. 835, Part V, § 394, and amendments thereto for the purpose of considering the question of applying for a city charter for the town, and no meeting of the inhabitants of the town was ever called or warned in accordance with the by-laws or a vote of

the town to consider questions of making application for a city charter for the town, and no vote was ever passed at any town meeting in the town authorizing any person or persons to apply for a city charter for the town, and the town of Methuen took no action in any manner or form at any town meeting duly warned by an article in the warrant relative to a city charter, "unless and except the following can be construed as a compliance with the provisions of the second amendment to the Constitution:"

On March 21, 1914, at a regular town meeting of the qualified inhabitants of the town of Methuen, a vote was passed providing for the appointment of a committee of nine qualified inhabitants of the town to investigate the advisability of changing the then existing form of town government of the town, and that such committee report their recommendations to a future meeting. At this meeting the warrant contained no article warning the inhabitants of any proposed change in the form of the town government or of the proposed appointment of the committee. The committee was appointed and acted in accordance with its instructions and submitted its report at the next annual town meeting held on March 6, 1915, under the article in the town warrant, "To hear reports of committees and to act thereon," and recommended an application to the Legislature for the limited town meeting form of government, so called. Spec. St. 1916, c. 116, was passed by the Legislature, was approved by the Governor on February 24, 1916, and was accepted by the voters at a special election on July 29, 1916. On March 1, 1917, a hearing was held by the joint Legislative Committee on Cities in the town hall of Methuen, notice of the hearing having been duly advertised in newspapers announcing that the committee would give a hearing to parties interested in a Senate bill providing for a charter for Methuen, the notice being signed by the chairman and the clerk of the committee. That hearing was largely attended by the inhabitants of the town of Methuen, but the number present is unknown. A vote was taken at that hearing at which every person present, except one, voted in favor of changing from town form of government to the city form of government. The hearing was not presided over by the moderator of the town of Methuen, no check list of legal voters was used in connection with the aforesaid votes, no records of the hearing were kept by the town clerk of the town, who did not

function at the hearing, and the number of voters present and voting thereon is unknown. Thereafter the committee reported to the Senate a bill which eventually was passed and, having been approved by the Governor, became Spec. St. 1917, c. 289. It was submitted to the legal voters of Methuen at the annual State election of the year 1917, when it was accepted, nine hundred and twelve voting in favor of and four hundred and fifty voting against acceptance, there also being two hundred and ten blank ballots. In December, 1917, an election was held at which a mayor and a board of aldermen were elected and on the first Monday in January, 1918, there was organized and inducted into office a full set of officers called for by the provisions of the charter and from that day until the date of this information the respondent city has conducted its affairs under and in accordance with the provisions of that charter, and no town officers have functioned.

The relator, Charles W. Mann, was present and took part in the hearing called by the Legislative committee and there stated "that the town ought to have the right of voting whether it wanted a charter or not." Since the alleged adoption of the charter he at one time has been nominated as a candidate for the city council, but at that time he did not have knowledge of any defect, constitutional or otherwise, in the alleged city charter, and as soon as he knew of the alleged defects he objected to the validity of the charter by disclosing to the Attorney General the defects set forth in the information.

The case was reserved by *Braley*, J., for determination by this court upon the pleadings and the agreed statement of facts.

F. W. Morrison, (*A. E. Seagrave*, Assistant Attorney General with him,) for the relator.

J. P. Kane, (*C. A. Clifford* with him,) for the respondent.

RUGG, C. J. This is an information in the nature of a quo warranto brought by the Attorney General "in behalf of the Commonwealth and at the relation of Charles W. Mann" against the city of Methuen seeking to have the city charter of Methuen declared void as having been enacted contrary to the requirements of art. 2 of the Amendments to the Constitution, and to have a judgment of ouster accordingly.

The question whether the Attorney General has power by virtue of his office to bring an information in the nature of a

quo warranto to test the validity of a city charter never before has arisen in this Commonwealth. It is a question which would be likely to arise infrequently. There seems to be no sound reason why the Attorney General should not have the same right to institute proceedings respecting the usurpation of the franchises and prerogatives of a municipality or other governmental subdivision as he possesses respecting like acts of a private or *quasi* public corporation. The evil is likely to be quite as great in one case as in the other. The public interest in its suppression is as acute in the one instance as in the other. That proceedings of this nature be instituted by an officer of the State acting under the responsibility of his oath and with the impartiality naturally flowing from his position rather than through the heat of partizanship or the ungenerous impulses of personal antagonism apart from a personal right or interest, is as desirable in the one case as in the other. That the Attorney General has such power follows from the discussion in *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 194. See also *Attorney General* v. *Suffolk County Apportionment Commissioners*, 224 Mass. 598, 610, 611.

An information in the nature of a quo warranto may be brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and prerogatives of a municipal corporation have been usurped. The municipality nominally and in fact exercising such franchises and prerogatives may be made the party defendant. That proposition rests upon sound principle. It is supported by the great weight of adjudications in other jurisdictions. *State* v. *Bradford*, 32 Vt. 50. *Nelson* v. *Consolidated Independent School District of Troy Mills*, 181 Iowa, 424. *People* v. *Kingsland*, 70 N. Y. 518. *People* v. *Powell*, 274 Ill. 222, 227. *Evens* v. *Anderson*, 132 Minn. 59, 62. *Earlboro* v. *Howard*, 47 Okla. 455. *State* v. *Birmingham*, 160 Ala. 196. *State* v. *Clark*, 75 Neb. 620. *Brennan* v. *Bradshaw*, 53 Texas, 330. *State* v. *Osburn*, 24 Nev. 187. *Dakota* v. *Armstrong*, 6 Dak. 226. *Askew* v. *Manning*, 38 U. C. (Q. B.) 345, 361. *State* v. *Commissioners of Ford County*, 12 Kans. 441. *Henry* v. *Steele*, 28 Ark. 455. *Bateman* v. *Florida Commercial Co.* 26 Fla. 423. *Velasquez* v. *Zimmerman*, 30 Col. 355. *State* v. *Atlantic Highlands*, 20 Vroom, 457. *State* v. *Woods*, 233 Mo. 357. *State* v. *Leischer*, 117 Wis. 475. *Rex* v. *Corporation of*

Carmarthen, 2 Burr. 869. *The King* v. *Ogden*, 10 B. & C. 230. There is nothing in *Attorney General* v. *Sullivan*, 163 Mass. 446, at variance with this conclusion. See *Attorney General* v. *Salem*, 103 Mass. 138.

It becomes unnecessary to consider whether the circumstances are such that the relator would be barred of relief for any reason. Manifestly there is nothing on this record which prevents the Attorney General from asking the court to consider his contentions. *Commonwealth* v. *Allen*, 128 Mass. 308.

The constitutionality of Spec. St. 1917, c. 289, is assailed. The ground upon which that contention rests is that that statute was not enacted as required by the Constitution and hence that the exercise of the franchises of a city by the defendant is a usurpation. That statute in form provides that the inhabitants of the town of Methuen shall continue and become a body corporate and politic under the name of the city of Methuen, enjoying all the rights and powers and subject to all the duties and obligations of cities as municipal corporations. That act was submitted to the legal voters of the town "for their acceptance or rejection," and was "accepted" by them by ballot as provided by § 54 of c. 289. Officers of the city were elected in December, 1917, and assumed the control of the municipal affairs of Methuen on the first Monday of January, 1918. Since that time its government has been in accordance with c. 289.

The only authority conferred by the Constitution to establish a city is found in art. 2 of the Amendments. It is in these words: "The General Court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this Commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the Constitution, as the General Court shall deem necessary or expedient for the regulation and government thereof, and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise, for the election of officers under the Constitution, and the manner of returning the votes given at such meetings. Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town,

present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose. And provided, also, that all by-laws, made by such municipal or city government, shall be subject, at all times, to be annulled by the General Court." The precise points urged against the validity of the statute are (1) that there was no application for the enactment of a statute constituting the town of Methuen to be a city by a majority of the inhabitants of that town present and voting thereon pursuant to a vote at a meeting duly warned and holden for that purpose: and (2) hence that Spec. St. 1917, c. 289, is void as a city charter.

These exact points have not hitherto been presented for determination. Their decision depends upon the meaning of art. 2 of the Amendments to the Constitution. That article was proposed and adopted because the Constitution as it stood theretofore required a town form of government "not adapted to the condition of a populous town," and because it was deemed necessary "to authorize such an organization as is adapted to the condition of a numerous people." Remarks of Lemuel Shaw, Journal of Mass. Convention, 1820–1821, page 98.

There are few decisions respecting art. 2 of the Amendments to the Constitution. It was said by Chief Justice Gray in *Hill* v. *Boston*, 122 Mass. 344, at page 357: "The Constitution does not indeed allow a city to be established in the first instance, so as to transfer the immediate control of local affairs from the whole body of citizens in town meeting to a delegated city council, except with the consent and on the application of a majority of the inhabitants." *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84, 101. In *Larcom* v. *Olin*, 160 Mass. 102, St. 1892, c. 377, which established a model form of city charter and provided for its adoption by vote of a town possessing other constitutional requisites for becoming a city without further action by the General Court, was held to be contrary to the terms of art. 2 of the Amendments. In the course of the opinion, written by Chief Justice Field, it was said, at page 108: "The proviso was inserted in the proposed amendment that the voters in small towns might continue to hold their ancient privileges of managing their own town affairs. The limit was fixed at twelve thousand inhabitants, and it was also provided that, although the town contained twelve thousand inhabitants, the General Court should not constitute it a

city government except 'with the consent and on the application of a majority of the inhabitants,' etc. The practical construction put upon the proviso has been that the town must first make an application to the General Court by a vote of its inhabitants, and, if an act of incorporation is passed pursuant to the application, that the act must be submitted for acceptance to the inhabitants. Whether two meetings and two votes are necessary or not, certainly there must be an application and a consent manifested by a vote pursuant to the proviso. The General Court cannot constitute a small town a city in any manner, and it can constitute a town containing twelve thousand inhabitants or more a city only upon its own application, and the General Court is not required to constitute such a town a city if it makes the application, but is only authorized to do so if it sees fit." The substance of that decision was stated in *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, at page 576, in these words: "In brief, the ground was that art. 2 of the Amendments to the Constitution plainly contemplated that the question, whether any municipality should make the initial change from a town to a city form of government, must be decided in each instance as it arose upon petition by the majority of the inhabitants of the town, by the General Court itself, and the particular terms of each city charter which marked that transformation should receive the careful attention of the legislative department of government. This intent of the people in adopting the Second Amendment to the Constitution doubtless had its foundation in deep-seated regard for the town meeting form of government and a thorough appreciation of the significance of discarding it for administration of local affairs through the city form of government."

The plain implication if not the express words of the opinion in *Larcom* v. *Olin* and the natural inference from the other decisions is that the Second Amendment requires that the first step toward a change from the town to the city form of government must be an application presented to the General Court in consequence of a preceding vote adopted by a majority of the inhabitants of the town present and voting in a meeting warned and held for that purpose.

Fair interpretation of the meaning of the amendment as disclosed both by its words and its history leads irresistibly to the

same conclusion. An amendment to the Constitution is one of the most solemn and important of instruments. It commonly is a brief and comprehensive statement of a general principle of government. It ordinarily is not long, complicated nor detailed and does not descend to the minute particulars appropriate to a statute. Its phrases are chosen to express generic ideas, and not nice shades of distinction. Its words should be interpreted in "a sense most obvious to the common understanding at the time of its adoption," because it is proposed for public adoption and must be understood by all entitled to vote. *Bishop* v. *State*, 149 Ind. 223, 230. *State* v. *Butler*, 70 Fla. 102, 133. Mr. Justice Holmes in *Eisner* v. *Macomber*, 252 U. S. 189, at page 220. *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 523, 524.

The first sentence of the Second Amendment, standing by itself alone, is a clear, unqualified, explicit grant of power to the General Court "to erect and constitute municipal or city governments." If that sentence stood alone there could be no doubt of the authority of the General Court even to impose a city form of municipal government upon the inhabitants of a town against their protest. But that sentence does not stand alone. It is followed by another sentence, the first word of which is, "Provided." That word in common speech naturally expresses a qualification, a limitation, a condition, or an exception respecting the scope and operation of words previously used. Although a proviso in statutes, contracts or wills not infrequently introduces new or independent matter, its true office and its general purpose is to restrict the sense or make clear the meaning of that which has gone before. *American Express Co.* v. *United States*, 212 U. S. 522, 534. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181. *Brennan* v. *Brennan*, 185 Mass. 560. *Considine* v. *Metropolitan Life Ins. Co.* 165 Mass. 462, 464, 465. The substance of the second sentence of the amendment shows unequivocally that its introductory word "Provided" is used in its natural sense and true office. Its words are those of condition and qualification. They express clear and definite limitation in at least two particulars upon the amplitude of power described in the preceding sentence. The first limitation defines the minimum number of inhabitants which a town must contain before the power of the Legislature can become operative. The second limitation is that no city government shall

be erected or constituted "unless it be with the consent, and on the application of a majority of the inhabitants of such town." Those words convey the unmistakable meaning that the power of the General Court cannot be put forth to the incorporation of a city unless its action to that end first is sought by inhabitants of the town. "Application" in this connection can have no other rational significance than an appeal, a request, a petition. "Application" cannot with any due regard to the approved usages of the language be construed in the sense of ratification or subsequent approval. The second sentence of the amendment goes further and points out the way in which the "consent" and "application" of the town must be manifested. Such "consent" and "application" must be ascertained and declared by a vote of a majority of the inhabitants "present and voting thereon . . . at a meeting duly warned and holden for that purpose." All the inhabitants of the Commonwealth in 1821, when the Second Amendment to the Constitution was approved by the people, were familiar with the method of calling and conducting a town meeting, because there were no cities and everybody lived under the town form of government, except the few dwelling on common lands or in unincorporated communities. To such persons these words of the amendment could convey but one idea, namely, a meeting called under a written warrant setting out in fairly intelligible language the subjects to be acted upon by the voters, signed by the selectmen or, in the event of their unreasonable refusal, by a justice of the peace of the county, and served by the constable or other designated person. St. 1785, c. 75, § 5. Such a warrant is of the essence of the town meeting. It is necessary in order that the people may know in advance the subjects upon which they may be required to act.

The concluding sentence of the Second Amendment has no relevancy to the questions here presented.

The Second Amendment was proposed by the Constitutional Convention of 1820. The report of the debates of that convention shows how jealous was the feeling in favor of the town system of government, then universally prevailing, and against any change except in such populous centres as imperatively required some different system. The attachment of the people to the town meeting form of government was profound and its essential characteristics were guarded with sedulous care. It cannot be thought that

the words of the amendment proposed and approved under such circumstances were used or understood in any other than their natural meaning. The inference cannot be escaped that the people intended to place substantial checks upon the power of the General Court to establish cities and so to curb its authority as to give it a right to act to that end only after it had been asked by the inhabitants of a town for incorporation as a city, a request which must be expressed according to the well settled forms of the town meeting.

It sometimes has been suggested that the words of a constitution may be construed in a directory rather than in a mandatory sense. Respecting that matter there is found this cogent and convincing statement in Cooley, Const. Lim. (6th ed.) 93: "Courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have

expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication." Without entering more at large into the discussion of that subject, it is enough to say that the words of the Second Amendment are not susceptible of having any other than the positive and indisputable meaning which their natural significance imports and which we have already amplified. They cannot be treated as mere directions to be disregarded at the will of the Legislature. They are positive bounds to its jurisdiction to act.

This conclusion is supported by the great weight of authority in other jurisdictions. *Prothro* v. *Orr*, 12 Ga. 36, 42, 43. *State* v. *Bankers' & Merchants' Mutual Benefit Association*, 23 Kans. 499, 501. *Metropolitan Casualty Ins. Co.* v. *Basford*, 31 So. Dak. 149, 166–169. *People* v. *Lawrence*, 36 Barb. 177, 186–188. *Coleman* v. *Eutaw*, 157 Ala. 327, 336, 337. *State* v. *Osborne*, 14 Ariz. 185, 192. *Crawford* v. *Gilchrist*, 64 Fla. 41. *Varney* v. *Justice*, 86 Ky. 596, 601. *State* v. *Hitchcock*, 241 Mo. 433, 464, 465. *Crabbe* v. *Celeste Independent School District*, 105 Texas, 194, 198. *People* v. *Leddy*, 53 Col. 109, 112, 113. *State* v. *Tibbets*, 52 Neb. 228, 233. *Memphis Street Railway* v. *Byrne*, 119 Tenn. 278, 287. *Fidelity Ins. Trust & Safe Deposit Co.* v. *Shenandoah Valley Railroad*, 86 Va. 1, 5.

Such, then, is the meaning of the Second Amendment. It remains to inquire whether there was conformity thereto in the enactment of Spec. St. 1917, c. 289.

The petition to the General Court for the incorporation of the town of Methuen as a city was signed by the three persons who were the selectmen of the town, alleging themselves to be "citizens of Massachusetts." Against their signatures were written the words "Board of Selectmen." No town meeting was held in Methuen for the purpose of considering the question whether application should be made to the General Court for a city charter, and the town took no action in any manner or form to that end.

It is plain that there was no vote of a majority of inhabitants of Methuen in favor of an application to the General Court for the granting of a city charter at a meeting duly held and warned for that purpose before the enactment of Spec. St. 1917, c. 289.

The proceedings of the town relative and antecedent to the enactment of Spec. St. 1916, c. 116, entitled "An Act to provide for

precinct voting, limited town meetings, town-meeting members, a referendum and an annual moderator in the town of Methuen," all were taken at meetings held without any warning of a purpose to change the form of municipal government. The committee to consider that subject was appointed at a meeting which contained no article whatsoever concerning the subject. The report of that committee recommending application to the Legislature for "the limited town meeting form of government, so called," was made at a meeting containing only an article "To hear reports of committees and act thereon." It does not appear even that a vote adopting this recommendation was passed. Manifestly such proceedings were not had at meetings "warned and holden for that purpose." These words mean that there must be an article in the warrant for the meeting fairly calling attention to the subject as a matter to be considered. It follows that, since action by the town is a necessary prerequisite to a change from a town meeting form of government to a city government, these proceedings do not constitute such action. Hence arguments in behalf of the defendant founded upon *Opinion of the Justices*, 229 Mass. 601, have no relevancy to the present case.

It was conceded during the argument at the bar that the so called limited town meeting had not undertaken in any way to commit the town to the city form of municipal government. Therefore it becomes unnecessary to consider the force and meaning of § 10 of c. 116, Spec. St. 1916.

The joint legislative committee on cities held a public hearing at the town hall in Methuen on March 1, 1917, pursuant to an advertised notice to persons interested in a bill providing for a city charter for Methuen. The hearing was largely attended but the number present is unknown. This was a hearing by a legislative committee. Its conduct and procedure were under the management of that committee. It was not presided over by the moderator of the town; no check list was used and no records kept by the town clerk. That was not a town meeting. It did not purport to be a town meeting. The legislative committee did not undertake to call a town meeting. It had no authority to call a meeting of the voters of the town. That can only be done by a warrant under the hands of the selectmen directed to the constables or other designated persons, and, in the event of their

unreasonable refusal, by a justice of the peace. These provisions have remained unchanged in substance since St. 1785, c. 75, § 5, until the present. St. 1913, c. 835, §§ 394, 396. *Walsworth* v. *Casassa*, 219 Mass. 200. Clearly votes passed at a hearing before a legislative committee under these circumstances did not constitute an application for a city charter by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by the Second Amendment.

It is a principle of constitutional law early declared and consistently followed by this court that every rational presumption is made in favor of the validity of an act of the Legislature, and its enforcement will not be denied unless its conflict with the Constitution admits of no reasonable doubt. *Perkins* v. *Westwood*, 226 Mass. 268, and cases collected at page 271. *Norwich* v. *County Commissioners*, 13 Pick. 60, 61. *In re petition of Mayor & Aldermen of Northampton*, 158 Mass. 299, 304. *Commonwealth* v. *O'Neil*, 233 Mass. 535, 541. This principle is kept constantly in mind. No other course, however, is open to us in the case at bar. It is impossible to say that a subsequent acceptance by the voters of a town of a statute establishing it as a city is compliance with the plain requirement of the Second Amendment to the effect that the application for the enactment of such a statute must come first from the town acting under its town meeting form of expression of public sentiment before the General Court has power or authority under the Constitution to enact such a statute. We are constrained to hold that Spec. St. 1917, c. 289, was not enacted in accordance with art. 2 of the Amendments to the Constitution.

The further question now arises whether the writ ought to issue under the circumstances here disclosed, notwithstanding the violation of the Constitution in the enactment of the city charter. It was said in *Stoughton* v. *Baker*, 4 Mass. 522, 528: "No laches can be imputed to the government, and against it no time runs so as to bar its rights." The rule of numerous early English cases concerning quo warranto is to the same effect. *The King* v. *John*, 8 Mod. 132. *The King* v. *Powell*, 8 Mod. 166. *The King* v. *Pyke*, 8 Mod. 286. *Winchelsea Causes*, Burr. 1962. See however *The King* v. *Peacock*, 4 T. R. 684. Estoppel does not apply ordinarily against the exercise of a public right. The interests of the Com-

monwealth usually are held not to be prejudiced by the failure of public officers to do their duty. This rule prevails generally. *Attorney General* v. *Revere Copper Co.* 152 Mass. 444, 449, 451, and cases there collected. *Grand Trunk Western Railway* v. *United States*, 252 U. S. 112, 122. *United States* v. *St. Paul, Minneapolis & Manitoba Railway*, 247 U. S. 310, 314. *People* v. *Long Beach*, 155 Cal. 604. *People* v. *Keigwin*, 256 Ill. 264, 273. *State* v. *Wofford*, 90 Texas, 514. In the absence of some special statutory provision, that principle applies to quo warranto proceedings instituted by the Attorney General in behalf of the Commonwealth. It commonly has been so held. *Commonwealth* v. *Allen*, 128 Mass. 308. *State* v. *Port of Tillamook*, 62 Ore. 332, 334. *State* v. *Pawtuxet Turnpike Co.* 8 R. I. 521. *People* v. *Gary*, 196 Ill. 310, 327.

There is, however, another principle to be considered in this connection. The granting of relief by quo warranto, even when sought at the instance of the Attorney General, in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion. It is the duty of the court to consider all the conditions, including immediate and remote consequences and to determine with a broad vision of the public weal whether on the whole the common interests demand the issuance of this extraordinary remedy. Where the legality of the organization of a municipality is concerned, then even the Attorney General in his public capacity cannot as of right demand the issuance of quo warranto. His application must be considered in all its bearings as related to the general welfare. One of the grounds on which quo warranto was denied in *Commonwealth* v. *Athearn*, 3 Mass. 285, 287, was said by Chief Justice Parsons at page 287 to be that "in the present case it would not be a discreet and proper exercise of their authority." As Lord Mansfield put it in *The King* v. *Stacey*, 1 T. R. 1, at page 2: "The court are bound to consider all the circumstances of the case, before they disturb the peace and quiet of any" municipal corporation. Where important public interests have become affected and there has been considerable delay, sound judicial discretion may require denial of affirmative action and refusal to oust a municipality from the exercise of its franchise. This proposition is supported by the great weight of authority and no decision to the contrary has come to our attention. *State* v. *Des Moines*, 96 Iowa, 521, 531 to 536. *Jameson* v. *People*, 16 Ill. 257.

People v. *Maynard*, 15 Mich. 463, 470. *State* v. *Lincoln Street Railway*, 80 Neb. 333, 346. *State* v. *Leatherman*, 38 Ark. 81, 89. *Soule* v. *People*, 205 Ill. 618, and *People* v. *Union Elevated Railroad*, 269 Ill. 212, 231, where other Illinois cases to the same effect are collected. Cooley, Const. Lim. (7th ed.) 363, 364; (5th ed.) 311. See *Rumsey* v. *People*, 19 N. Y. 41; *Lanning* v. *Carpenter*, 20 N. Y. 447.

In this particular the practice touching quo warranto conforms to that which prevails as to other extraordinary writs. The granting of the writ of mandamus is not a matter of right but rests in sound judicial discretion. *Smith* v. *Commissioner of Public Works of Boston*, 215 Mass. 353, and cases collected. The same is true of the writ of certiorari. *Sears* v. *Mayor & Aldermen of Worcester*, 180 Mass. 288, and cases cited. *Swan* v. *Justices of the Superior Court*, 222 Mass. 542.

The present information, although brought by the Attorney General "in behalf of the Commonwealth," is also averred to be "at the relation of Charles W. Mann, of Methuen in the County of Essex." The concluding paragraph of the information opens with these words: "Wherefore, the Attorney-General upon relation of Charles W. Mann, as aforesaid, prays. . . ." The only facts revealed by the record concerning the relator are that he was present and took part in the hearing before the legislative committee at the town hall in Methuen on March 1, 1917, and there stated "that the town ought to have the right of voting whether it wanted a charter or not;" that since the alleged adoption of the charter he has once been nominated as a candidate for the city council, not at that time having actual knowledge of any constitutional defect in the city charter, and that as soon as he knew of the alleged defects he objected to the validity of the charter by disclosing to the Attorney General the defects set forth in the information. Although the brief for the informant before this court is signed by the Attorney General and one of his assistants, it is also signed by counsel for the relator and the only oral argument was made by counsel for the relator. The permission of such argument must not be taken as a precedent. The granting of a city charter is an attribute of the sovereign power. It cannot be assailed in this form of proceeding by one who has only the standing of a private citizen. An information of this nature must be prosecuted

by and in behalf of the Commonwealth and by or under the immediate supervision of the Attorney General and in that way alone. *Attorney General* v. *Adonia Shomo Corp.* 167 Mass. 424. *Haupt* v. *Rogers*, 170 Mass. 71. R. L. c. 192, §§ 6–13. See *McGlue* v. *County Commissioners*, 225 Mass. 59.

If the name of the relator be rejected as surplusage, enough would remain to show that the information was filed by the Attorney General in behalf of the Commonwealth. The case is treated on that footing.

The relief sought is to have a judgment of ouster against a municipality from exercising the functions of a city because a statute, which has received the affirmative action of the legislative department of government and the approving signature of the Governor, is contrary to the fundamental law. The establishment of a city in place of a town form of government is the exercise of a legislative function of a high order. It involves immediate and important public interests. A city charter cannot in the nature of things be enacted except after a generous degree of publicity. This charter was approved by the Governor on April 17, 1917. A period of nearly nine months elapsed before a city government was inaugurated upon its supposed authority. During that period of course the validity of the charter might have been tested in appropriate proceedings. See *Graham* v. *Roberts*, 200 Mass. 152. The inauguration and maintenance of a city government is full of publicity. Methuen has been recognized as a city by the General Court in several statutes enacted subsequent to Spec. St. 1917, c. 289. See St. 1919, c. 340; St. 1920, c. 83; Spec. St. 1918, cc. 36, 184. See also Spec. St. 1919, c. 215. State taxes have been assessed upon Methuen as a city, the collection of which must have been made through the instrumentality of those purporting, under Spec. St. 1917, c. 289, to be officers of the city. Sts. 1918, c. 279; 1919, cc. 344, 346; 1920, cc. 557, 612. The same is true of county taxes. St. 1919, c. 343. The population of the town of Methuen according to the State census of 1915 was slightly in excess of fourteen thousand. It is manifest that in so large a community considerable sums of money must have been raised by taxation and expended for public uses. All the manifold activities of a municipality have been carried on for about two years and a half under the supposed authority of Spec. St. 1917, c. 289, as a valid city charter before

the filing of this information. Many contracts must have been made in reliance upon its assumed force. It must be presumed that the public schools have been kept, teachers employed, police and fire protection afforded, highways constructed and maintained, the poor relieved, and other necessary attributes of the government of a city performed. It is quite possible that the power of eminent domain has been exercised. Money doubtless has been borrowed and the credit of the city in form pledged for its payment. Without further enumeration, it is manifest that great havoc in divers directions that can be foreseen, and doubtless in sundry others not now in mind, would be wrought by issuing a quo warranto against Methuen for usurping the franchise of a city. The evil consequences which would flow from issuing the quo warranto would not be in any measure lessened by the circumstance that the Attorney General had no knowledge of the invalidity of the city charter of Methuen until it was called to his attention by the relator. There must be timely assertion even of constitutional rights. Ignorance of pertinent facts is not generally an excuse for failure to vindicate them seasonably. *Lebowitch, petitioner*, 235 Mass. 357.

All these considerations lead to the conclusion that it would not be a discreet exercise of judicial power and would not be in conformity to the general public interest to grant the relief prayed for. Whatever legal consequences may flow from the fact that the city charter of Methuen is an unconstitutional statute must be met as and when they arise. Our refusal, in the exercise of sound judicial discretion, to issue the extraordinary writ of quo warranto under the circumstances, cannot affect those consequences. Those consequences may be alleviated so far as possible by taking the obvious steps to remedy the present situation, and to put Methuen upon the basis of a constitutional charter.

Information dismissed.

CHARLES DORMAN'S (dependent's) CASE.

Suffolk. October 20, 1920. — January 4, 1921.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Jurisdiction. Admiralty. Workmen's Compensation Act.

The provisions of the workmen's compensation act are not operative in favor of a dependent of an employee of a subscriber under the act who lost his life from causes arising out of and in the course of his employment as mate upon a steam lighter used by the employer in coastwise traffic for the transportation of sand and gravel between Scituate and Boston and while the vessel was within three miles of shore.

CERTIFICATION, filed in the Superior Court on February 3, 1920, under the provisions of the workmen's compensation act, of a decision of the Industrial Accident Board awarding compensation to Sarah M. Dorman, widow of Charles Dorman, who was found to have died by reason of an injury arising out of and in the course of his employment by the Boston Sand and Gravel Company.

The decision of the Industrial Accident Board contained the statement: "No question was raised as to the constitutionality of the amendment of 1917 [40 U. S. Sts. at Large, c. 97, § 2]. This question has been argued and decision is now pending before the Supreme Court of the United States in the case of *Knickerbocker Ice Company* v. *Lillian E. Stewart*, . . . in error to the Supreme Court of the State of New York."

In the Superior Court, by order of *Fox*, J., a decree was entered in accordance with the decision of the Industrial Accident Board. The insurer appealed.

J. F. Scannell, for the insurer, submitted a brief.

G. E. Kemp, for the claimant.

RUGG, C. J. Charles Dorman was employed as mate upon a vessel described as a steam lighter named the "Herbert," used by its owner in coastwise traffic for the transportation of sand and gravel between Scituate and Boston. At the time in question the "Herbert" was on a voyage over tidewater between these two places, and was in or just outside of Boston Harbor and within

three miles of shore. Dorman was employed by the Boston Sand and Gravel Company, which was insured under the workmen's compensation act, and which owned the vessel.

It is assumed in favor of the dependent for the purposes of this decision that Dorman lost his life from causes arising out of and in the course of his employment. These causes manifestly were operative under such circumstances as to bring any legal liability arising therefrom within admiralty cognizance. The locality of the incident is decisive upon that point. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 Wall. 20, 36. *Proctor* v. *Dillon*, 235 Mass. 538, 541.

The circumstance that the "Herbert" was engaged exclusively in commerce within the territorial limits of this Commonwealth and did not go outside the three mile limit does not divest the occurrence of its admiralty character, which depends wholly upon the question whether it is upon navigable waters. *The Robert W. Parsons*, 191 U. S. 17. See *North Pacific Steamship Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.* 249 U. S. 119; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

The workmen's compensation act is broad enough in its terms to include cases like the one at bar. But it is plain from the facts here disclosed that that act (apart from a federal statute to be mentioned in a moment) could not be operative in favor of the dependent under the Constitution of the United States. That was settled beyond question by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, decided in May, 1917. We were constrained to follow that decision in *Duart* v. *Simmons*, 231 Mass. 313; *S. C.* 236 Mass. 225, and in *Sterling's Case*, 233 Mass. 485. After the decision in the Jensen case Congress attempted to confer jurisdiction upon the several States to deal with cases like the present by workmen's compensation laws by the enactment of 40 U. S. Sts. at Large, 395, § 2, approved October 6, 1917. Seemingly the exclusive nature of federal jurisdiction under admiralty law was released to the States by that act taken at its face value. *Duart* v. *Simmons*, 231 Mass. 313, 320. The constitutionality of that act was assailed, however, and by the decision in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, rendered since this case was heard and decided by

the Industrial Accident Board, it was held to be invalid because beyond the powers of Congress under the Constitution. We are bound by that decision. It is decisive against the right of the dependent to compensation in the case at bar. See also *Sudden & Christenson* v. *Industrial Accident Commission*, 182 Cal.

There are no circumstances disclosed on this record which estop the insurer from availing itself of this point, or which show a waiver of its right to this defence. That is settled by *Sterling's Case, supra*. The point goes to the jurisdiction of the court, which cannot be established by considerations arising from conduct of parties. The case is quite distinguishable from cases like *Pitkin* v. *Springfield*, 112 Mass. 509, and *Hellen* v. *Medford*, 188 Mass. 42. By force of the controlling authority of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, the entry must be

Decree reversed.

Decree to be entered in favor of the insurer.

FLORENCE A. TRACY *vs.* ELIZABETH BLINN.

Bristol. October 25, 1920. — January 4, 1921.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Deed, Reformation. *Frauds, Statute of. Equity Jurisdiction*, To reform deed, Mistake.

If the owner of certain real estate orally agrees to sell it for a certain price and upon the payment of the price conveys to the purchaser only about one half of what both parties intended should be conveyed, the purchaser cannot maintain a suit in equity against him for reformation of the deed so that it will include the land omitted by mutual mistake, where it does not appear that the purchaser entered upon or took possession of the portion of land omitted from the deed or made any improvements thereon or paid any taxes assessed thereon, or that his condition or position was so changed because of his reliance upon the oral agreement that he would be left without redress if the agreement was held unenforceable, but it appears only that, two and a half months after receiving the deed, the purchaser conveyed the land which was described in the deed to a third party and that it had been conveyed thereafter to successive grantees. Following *Glass* v. *Hulbert*, 102 Mass. 24.

BILL IN EQUITY, filed in the Superior Court on April 5, 1920, for the reformation of a deed of real estate to correct an error in omitting certain land from the description through an alleged mutual mistake of the parties.

Material allegations of the bill are described in the opinion. The defendant demurred to the bill. The demurrer was heard and was overruled and the suit then was heard upon the merits by *Flynn*, J., who found that a mistake had been made as alleged in the bill, and that the defendant had paid taxes since April 1, 1911, upon the land sought by the plaintiff. By order of the judge a final decree was entered directing the defendant to convey the omitted land to the plaintiff upon her paying the taxes from April 1, 1911, to the date of the deed with interest. The defendant appealed both from the interlocutory decree overruling the demurrer and from the final decree.

E. N. Blinn, for the defendant.

J. E. Welch, (*J. B. Tracy* with him,) for the plaintiff.

CROSBY, J. This is a bill in equity for the reformation of a deed, by including the description of a parcel of land situated in the rear of that described therein, and which, it is alleged, was omitted by mutual mistake of the parties.

The case was heard by a judge of the Superior Court who found that it was the intention of the parties, at the time of the purchase and sale of the property set out in the plaintiff's bill, to include the lot in the rear of the parcel conveyed. As the evidence is not reported, the finding must stand.

The bill alleges that while negotiations were pending for the purchase of the property and shortly before the sale was consummated and the deed delivered, the defendant on the premises pointed out to the plaintiff the land to be sold, and the latter orally agreed to purchase it and to pay therefor $1,950; that in pursuance of the oral agreement, the defendant executed a deed to the plaintiff which conveyed only about one half of the land purposed to be sold, although it was the intention of the parties that the deed should include both parcels.

The land described and conveyed by the deed is situated on the westerly side of Purchase Street in Taunton, with a dwelling house thereon, and the lot, the description of which was omitted from the deed, adjoins it in the rear. The record shows that the

defendant obtained title to the two parcels by separate deeds on different dates from different grantors. The deed from the defendant to the plaintiff is dated, acknowledged and recorded January 4, 1911, and on March 20 of the same year she conveyed the property to one Machado, and thereafter by different grantors the title of the land has vested in various owners.

The defendant demurred to the bill, setting forth as one of the grounds of demurrer that the alleged oral agreement was within the statute of frauds. In her answer she denies the oral agreement and that there was any mistake in the description, and alleges that the deed correctly describes the land which was purchased by the plaintiff.

The relief prayed for is that the deed may be reformed so as to contain a description of the rear lot. The case of *Glass* v. *Hulbert*, 102 Mass. 24, is decisive against the contention of the plaintiff; in that case it was said at page 28: "If the case stood merely upon the oral contract of sale, with a conveyance of part and a neglect or refusal to convey another part of the land which was the subject of the alleged contract, we do not think it would be contended that the plaintiff could compel a conveyance of the other land, against a party denying the contract and setting up the statute of frauds. Courts are bound to regard that statute in equity as well as at law. The only remedy in equity, in such case, would be by a rescission of the entire contract, in which the aid of the court could be obtained, if necessary, upon proper grounds." The decision in that case is the settled law in this Commonwealth, although the courts in some other jurisdictions have reached a different conclusion. See L. R. A. 1917 A 571; *Graves* v. *Goldthwait*, 153 Mass. 268; *Goode* v. *Riley*, 153 Mass. 585, 587. In a case of this kind it is immaterial whether the relief sought is on the ground of fraud or mistake, the rule is the same, and is not different whether the remedy is for reformation of a deed, or the specific performance of an oral contract. It is well settled that an oral agreement for the conveyance of land may be enforced against a party denying the agreement and relying on the statute of frauds if there has been a part performance or change of situation creating an estoppel against the plea of the statute. In *Glass* v. *Hulbert, supra*, it was said at page 43: "This rule applies as well to the enforcement of such an agreement by way of rectifying a deed, as to a direct suit for its specific performance."

In the present case there is no allegation that the plaintiff took possession of the rear lot, whose description was omitted from the deed, or that there has been a part performance such as could be held to take the case out of the statute of frauds, and there is no allegation that there has been any change in the situation of the plaintiff. All that appears is that she held the record title to the property for less than three months and then sold it; accordingly *Williams* v. *Carty*, 205 Mass. 396, is distinguishable in its facts from the case at bar. *Davis* v. *Downer*, 210 Mass. 573.

There is no evidence that the plaintiff made any improvements on the property or ever paid the taxes thereon, or that her condition or position has been so changed because of her reliance upon the oral agreement, that she would be left without redress if it is held unenforceable. The circumstance that she has sold the property described in the deed is not such a change in her situation as entitles her to rely on the agreement.

In view of the conclusion reached, we need not consider whether the statute of limitations or laches is a bar to the maintenance of the bill.

Decree reversed.

JOHN DEVINE'S (dependent's) CASE.

Bristol. October 25, 1920. — January 4, 1921.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Procedure: hearing by single member of board, rehearing, appeal. *Constitutional Law*, Due process of law, Inviolability of contracts. *Statute*, Amendment.

Although participation in the provisions as to compensation in the workmen's compensation act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the General Court with relation to past events.

The committee on arbitration, constituted by § 6 of Part III of the workmen's compensation act, was a purely administrative tribunal and constituted no part of the substantive rights conferred by the act upon any of its beneficiaries.

The amendment of the workmen's compensation act contained in St. 1917, c. 297, abolishing the committee on arbitration and providing in substance that, where

parties failed to agree, the Industrial Accident Board might assign the case for hearing by a member of the board, was an amendment relating solely to procedure and not affecting any substantial right of employer, employee or insurer.

No constitutional right of a widow of an employee claiming compensation under the workmen's compensation act by reason of his death, which she alleged resulted on October 18, 1917, from injuries received on May 14, 1917, was impaired by the enactment on May 24, 1917, of St. 1917, c. 297, described above, nor by her claim being referred thereunder for hearing by a single member of the Industrial Accident Board instead of by a committee on arbitration appointed under § 6 of Part III of the act as amended by St. 1912, c. 571, § 11, which was in force at the time the alleged injury occurred.

In a claim under the workmen's compensation act by a widow of an employee whose death on an October 18 was alleged to have been caused by injuries received by him on the preceding May 14, a finding by a single member of the Industrial Accident Board and by the board, that the employee's death "was not due to or related to a personal injury which arose out of and in the course of his employment," is not contrary to nor necessarily inconsistent with an agreement by the parties at the hearing, that the employee "received a personal injury arising out of and in the course of his employment on May 14" and that he was paid compensation at the rate of $6 per week up to September 16.

Under § 10 of Part III of the workmen's compensation act, as amended by Sts. 1912, c. 571, § 13; 1917, c. 297, § 6, the granting of a motion for a rehearing of a claim upon any question of fact is a matter of discretion.

Upon an appeal from a decree of the Superior Court dismissing a claim for compensation under the workmen's compensation act following a denial, both by the Superior Court and by the Industrial Accident Board, of a motion by the claimant, supported by affidavits as to additional evidence, for a general rehearing of the case, it was *held* that the record failed to show that there had been any abuse of discretion in the denial of the motion, and that it could not be said that the discretion was not wisely exercised.

CERTIFICATION to the Superior Court, under the provisions of the workmen's compensation act, of decisions, hereinafter described, by the Industrial Accident Board relating to a claim by Margaret Devine, widow of John Devine, for compensation owing to his death alleged to have resulted on October 18, 1917, from an injury received on May 14, 1917, and to have arisen out of and in the course of his employment by Granite Mills.

The claim was assigned by the board to a single member for hearing under the amendment to the act contained in St. 1917, c. 297, §§ 5, 6. "It was agreed that John Devine, the deceased employee, received a personal injury arising out of and in the course of his employment on May 14, 1917; that his average weekly wages were $9, and that he was paid compensation at the rate of $6 per week up to September 16, 1917." The single member of the board found: "The death of the employee, on October 18,

1917, was not due to nor related to a personal injury which arose out of and in the course of his employment by the subscribers. . . . All the evidence leaves it as unlikely and improbable that the employee sustained a personal injury to the elbow on May 14, or that there is any casual [causal] connection between the condition which caused the employee's death and a personal injury arising out of and in the course of his employment."

After the filing of the decision of the single member with the board in accordance with § 7 of St. 1911, c. 751, Part III, as amended by Sts. 1912, c. 571, § 12; 1917, c. 297, § 4, the widow claimed a review by the board under § 10 as amended by Sts. 1912, c. 571, § 13; 1917, c. 297, § 6, and also filed with the board a "request for a rehearing" based on various grounds and supported also by affidavits as to "new evidence."

The Industrial Accident Board denied the motion for a rehearing, adopted and confirmed the findings of the single member and decided that the claim for compensation be dismissed.

In the Superior Court, the widow moved that the case be recommitted to the Industrial Accident Board "for one of the following purposes:

"1. To hear the parties and their witnesses and their evidence on the issue in regard to whether the employee's death was due to a personal injury arising out of and in the course of his employment.

"2. To hear the newly discovered witnesses and evidence of the widow on that issue and such witnesses and evidence as the insurer desires to offer on said issue.

"3. To send the case to be tried by a committee on arbitration according to the law as it was on the date of the accident.

"(If either the first or second is ordered, the widow will waive the objection based on the ground that the trial before a single member of the Industrial Accident Board was illegal.)"

The motion was heard by *Hammond*, J. He found that the record was not clear as to one aspect of the case, in that the Industrial Accident Board, while finding that the death of the employee "was not due to or related to a personal injury which arose out of and in the course of his employment," had nowhere dealt with a particular contention of the widow that the insurer's evidence would warrant a finding that the injury to the back of

the employee, concededly sustained on May 14, 1917, "lit up" an old diseased condition of the backbone and caused a general infection which produced septic pericarditis and thus caused his death; and that neither the single member nor the board had made any specific findings of the subsidiary facts relating to this claim. The judge accordingly made an order that the case be "recommitted to the Industrial Accident Board for the purpose of permitting the petitioner to move that specific findings be made with reference to her claim that the death of the employee was caused by aggravating or accelerating through the strain to his back due to the accident the consequences of a pre-existing diseased condition. If such motion is allowed and further findings made, the board may consider the case anew, and may if it sees fit permit the introduction of further evidence upon this branch of the case. This order of recommittal is made for the purpose above stated and not for the purpose of requiring the board to hear further evidence except as it may choose to do so." Upon the recommittal, the board found "that the death of the employee was not caused by aggravating or accelerating through the strain to his back due to the accident the consequences of a pre-existing diseased condition."

Accordingly, in the Superior Court by order of *Cox*, J., a decree was entered dismissing the claim; and the widow appealed.

C. R. Cummings, (*J. W. Nugent* with him,) for the widow.

H. S. R. Buffinton, for the insurer.

RUGG, C. J. This is an appeal from a decree of the Superior Court confirming a finding of the Industrial Accident Board to the effect that the death of John Devine, an employee under the workmen's compensation act, was not due nor related to a personal injury which arose out of or in the course of his employment, and dismissing the claim of his widow for compensation. The deceased employee is alleged to have received on May 14, 1917, the injury from which his death resulted. At that time it was provided by the act that in case of disagreement between the parties concerning compensation, a committee on arbitration should be formed to decide the matters in dispute. That committee was to be composed of a representative appointed by each of the respective parties and its chairman was to be a member of the board designated for that purpose. St. 1911, c. 751, Part III, §§ 6 and 7,

as amended by St. 1912, c. 571, §§ 11 and 12. These provisions were changed by St. 1917, c. 297, which was approved on May 24, 1917, and took effect on June 23, 1917, whereby the committee on arbitration was eliminated and its functions were transferred to a single member of the board. By the same statute the membership of the board was increased from five to seven, although now reduced to six. See St. 1919, c. 299, § 3; G. L. c. 24, § 2. The hearing and decision of the dependent's claim in the case at bar was had before a single member in accordance with St. 1917, c. 297.

1. The dependent now contends that this hearing and decision should have been by a committee on arbitration in accordance with the statute in force at the time of the alleged injury, and that the single member had no jurisdiction, although St. 1917, c. 297, was in force at the time the hearing occurred.

This point was raised for the first time by motion to recommit made in the Superior Court after adverse decisions by the single member and by the full board on appeal. It is assumed, but without so deciding, that the point thus raised, if sound, would affect the jurisdiction of the court and hence may be taken advantage of in this proceeding at any time before final decree. *Corcoran* v. *Higgins*, 194 Mass. 291. *Boston Bar Association* v. *Casey*, 227 Mass. 46, 50.

This contention of the dependent cannot be supported. St. 1917, c. 297, relates wholly to procedure and affects no substantial rights of the employer, employee or insurer. The general purpose of the workmen's compensation act was to substitute in cases to which it is applicable, for common law or statutory rights of action and grounds of liability, a system of money payments, based upon the loss of wages, by way of relief for workers or dependents of workers who receive injury in the course of and arising out of their employment. As stated in the "Report of the Commission on Compensation for Industrial Accidents" submitted in 1912, which framed the act adopted by the Legislature (without change except in Part V, § 3, whereby all liability insurance companies were granted the same privileges as the Massachusetts Employees' Insurance Association in the matter of insuring), at page 46, — "The Massachusetts law may be briefly characterized as an elective compensation insurance law giving

compensation for all injuries arising out of employment irrespective of negligence except those due to the serious and wilful misconduct of the injured employee. The basic principle of the act is that the cost of the injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view." The payments provided by the act are founded simply upon such injury and have no relation to any theory of fault on the part of the employer or right on the part of the employee either in tort or contract established by law prior to the passage of the act. All payments are by way of financial relief for inability to earn wages, or for deprivation of support flowing from wages theretofore received. The word "compensation," in the connection in which it is used in the act, means the money relief afforded according to the scale established and for the persons designated by the act, and not the compensatory damages recoverable in an action at law for a wrong done or contract broken. *Derinza's Case*, 229 Mass. 435, 441. The employee takes no part in the contract for insurance which is made solely by the employer and the insurer in accordance with the terms of the act. He has no active relation to it unless and until he receives a personal injury arising out of and in the course of his employment. The rights of the employee under the act rest neither in negligence nor contract. They arise wholly out of the workmen's compensation act. That act establishes a status for those subject to its provisions from which flow certain obligations and rights for employer, employee and insurer. Those obligations and rights, so far as the employee is concerned, are susceptible of enforcement exclusively through the procedure set forth in the act. That procedure is direct and flexible but peculiar to the act. It is neither an action at law nor a suit in equity. Certain features of practice concerning cases arising under the workmen's compensation act resemble in the main equitable procedure, *Gould's Case*, 215 Mass. 480, but they are not suits in equity. The forms of that procedure, like other statutes of that character, may be changed from time to time by the Legislature without affecting the constitutional rights of the employee. Whether the claim for compensation be heard and decided in the first instance by a committee on arbitration, the chairman of which is a member of the board, or by a single impartial individual who is a member of the board, is a

pure matter of procedure affecting no substantial right either of the deceased employee or his dependents. The amount to be paid under the act is in no way influenced by the change wrought by St. 1917, c. 297. The right to have an arbitration committee in case occasion arose for the ascertainment of compensation under the act formed no part of the contract of employment. It was wholly a legislative regulation of the means furnished by the law as a step in the ascertainment of the material facts in case a claim for compensation was made under the act. Although our act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the General Court. See *Young's Case*, 218 Mass. 346, 350. The committee on arbitration and the Industrial Accident Board are purely administrative tribunals created solely to administer the workmen's compensation act in aid to the courts. *Levangie's Case*, 228 Mass. 213. They constitute no part of the substantive rights conferred by the act upon any of its beneficiaries, but like other such tribunals may be changed at will by the Legislature.

That the amendment of the act made by St. 1917, c. 297, is procedural, not affecting rights of substance, is plain not only from examination of its terms in connection with their context in the act, but from the fact that the sections to which it relates are under Part III of the act, which is entitled "Procedure." It is clear from this circumstance that it was the legislative intention thereby to deal with procedure alone. *Bartoni's Case*, 225 Mass. 349, 354.

The case at bar in this particular is within the authority of many decisions. *Rogers* v. *Nichols*, 186 Mass. 440. *Selectmen of Amesbury* v. *Citizens Electric Street Railway*, 199 Mass. 394. *Howard* v. *Fall River Iron Works Co.* 203 Mass. 273, 276. *Hanscom* v. *Malden & Melrose Gas Light Co.* 220 Mass. 1, 3. *Simmons* v. *Hanover*, 23 Pick. 188. *Hallowell* v. *Commons*, 239 U. S. 506. *Ay-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401. *Campbell* v. *Iron-Silver Mining Co.* 27 C. C. A. 646; 83 Fed. Rep. 643. See in this connection *Wilson* v. *Head*, 184 Mass. 515; *Yeomans* v. *Heath*, 185 Mass. 189.

It was held in *Commonwealth* v. *Phelps*, 210 Mass. 78, after reviewing many decisions, that a statute enacted after the com-

mission of a capital offence was not void as an *ex post facto* law because its effect was to provide that one in place of two or more judges should preside at the trial of the defendant before a jury. In principle that case is decisive of the case at bar upon this point.

It seems plain to us that no constitutional right of the employee or of his dependent was in the slightest impaired by the enactment and enforcement of St. 1917, c. 297.

2. No discussion is required to demonstrate that the agreement of the insurer, to the effect that the employee received an injury on May 14, 1917, for which compensation was paid, had no reference whatever to the contention of the insurer that the cause of the employee's death was something wholly unconnected with that injury. The decision of the board was not contrary to any agreed fact.

3. The case was fully heard by the single member and his decision was that there was no causal connection between the death of the employee and the injury which arose out of and in the course of his employment. When the cause came on to be heard before the board on review, the dependent moved for further hearing on the merits supporting that motion with affidavits as to additional evidence. This motion was denied and the decision of the single member was affirmed. Motion was made by the dependent in the Superior Court that the cause be recommitted to the board for a new hearing with additional evidence on the merits. That motion for a general rehearing was denied. In this there was no reversible error. It is provided by the act, Part III, § 10, as amended, that "No party shall as a matter of right be entitled to a second hearing upon any question of fact." The implication of this sentence is that commonly there shall be no rehearing. There is no doubt of the power of the court to send a case back for further hearing when justice seems to require it. *Nelson's Case*, 217 Mass. 467. *Doherty's Case*, 222 Mass. 98. Both the Industrial Accident Board and a judge of the Superior Court have decided that in the present case there ought to be no rehearing. There is nothing on this record to show that there has been any abuse of discretion, and we are not able to say that it was not wisely exercised. *Fierro's Case*, 223 Mass. 378. *Bean's Case*, 227 Mass. 558. *Gorski's Case*, 227 Mass. 456.

4. The finding of the Industrial Accident Board manifestly

was supported by evidence and must stand. *Pass's Case*, 232 Mass. 515. No error of law is disclosed on the record.

Decree affirmed.

PARKER E. BLANCHARD *vs.* MARGARET G. REYNOLDS.

Suffolk. November 8, 1920. — January 4, 1921.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Of one owning or controlling real estate. *Proximate Cause.*

The duty which an owner of land, who maintains upon the land a wall or other structure bordering upon a public way, owes to persons upon the way is to keep such structure in a condition which shall be reasonably safe, having regard to its probable deterioration under exposure to the elements and also to all other attendant conditions which reasonably may be anticipated.

In an action, by a child against the owner of land who maintained a wall thereon bordering upon a public alley, for personal injuries resulting from the wall falling upon the plaintiff, a finding for the plaintiff is not warranted where the evidence tended merely to show that, to the knowledge of the defendant, the wall leaned toward the alley and that its fall was caused by a boy climbing upon and jumping from the wall while the plaintiff, a child four years and three months of age, was playing nearby, and there was no evidence tending to show that the defendant reasonably should have anticipated that boys or others would climb upon the wall, or how far the wall was out of plumb or whether its being so was due to its original design or to later action of the elements, or that it was in a defective condition.

In the action above described, it was *stated* that it was unnecessary to determine whether the act of one or more boys climbing on or over the wall was such an efficient intervening cause of the falling of the wall as to make the alleged primary cause too remote.

TORT for personal injuries alleged to have been caused by the fall of a wall maintained by the defendant on premises owned by him on Worcester Street in Boston and separating the premises from a public alley. Writ dated September 5, 1918.

In the Superior Court, the action was heard by *Hitchcock*, J., without a jury. Material evidence, findings of fact by the judge and exceptions saved by the defendant are described in the opinion. The judge found for the plaintiff in the sum of $300; and the defendant alleged exceptions.

The case was submitted on briefs.

C. W. Cushing, for the defendant.

H. H. Patten, for the plaintiff.

PIERCE, J. This is an action in tort to recover damages for injuries to the plaintiff, caused by the fall of a portion of a fence and wall which were in "the exclusive control of . . . [the] defendant." Sitting without a jury, at the close of the evidence the presiding judge refused to rule at the request of the defendant: (1) "On all the evidence the plaintiff cannot recover," and (2) "If the actions of one or more boys contributed to the accident, the plaintiff cannot recover, although the defendant might have been negligent." The bill of exceptions purports to contain "substantially all the evidence" as also a "Memorandum" including a finding of facts by the presiding judge. Such evidence warrants a finding of the following facts:

The defendant owned premises in the use and occupation of a tenant at will on Worcester Street. The plaintiff, four years and three months old, lived with his parents on premises near those of the defendant on Worcester Street. A public alley, wide enough for one team to pass, ran in the rear of the premises of the defendant and the plaintiff, parallel with Worcester Street. At the rear of the defendant's premises a brick wall separated the land from the alley. The wall was eight inches thick, was about five feet high, and was capped by a wooden fence eighteen inches high which was fastened to the wall by iron clamps. "The rails on . . . [the] fence slanted downward so that no one could walk thereon." It had leaned for a long time toward the alley. The evidence does not show to what degree it was out of plumb nor whether it was such in its original design or became such because of the action of frost or other natural force upon it or upon the binding material between the bricks. Nor beyond the fact that it leaned toward the alley is there any evidence to warrant the finding of the judge that it "was in a defective condition, and had leaned badly toward the alleyway for some time." On the day of the accident the plaintiff wandered out of his yard into the alleyway and thence went along that way to the rear of the defendant's premises, "where several older boys were congregated. . . . Some of the larger boys climbed on and over the fence while playing. One of the boys jumped off into the Paxton yard, causing a portion of

the fence and wall to fall over into the alley, and thereby injuring the plaintiff" who was playing with a dog in the middle of the alley.

The evidence warranted a finding that the defendant knew of the condition of the wall and fence. There is no reported evidence which warranted the finding of the judge that "The wall was in a defective condition, and had leaned badly toward the alleyway;" nor is there any evidence that "the falling of the wall was due in part to such defective condition;" nor is there any evidence that "boys were in the habit of playing" in the alleyway adjacent to the defendant's premises.

The duty of an owner of land who maintains a wall or other structure adjacent to a public way to persons upon the way is to maintain such a structure in a condition that shall be reasonably safe, having regard to its probable deterioration under exposure to air, wind and water, as also to all other lawful attendant conditions which might reasonably be anticipated. In the case at hand there is no evidence that the wall and fence were not in themselves reasonably safe and no evidence that either fence or wall would have fallen had boys not climbed upon and jumped from the wall. The evidence does not warrant a finding that the defendant reasonably should have anticipated that boys or others would climb upon the wall or fence.

It becomes unnecessary to determine whether the act of one or more boys in climbing on or over the fence was such an efficient intervening cause as to make the primary cause too remote. *Insurance Co.* v. *Tweed*, 7 Wall. 44, 52.

It follows that the first request to rule that "On all the evidence the plaintiff cannot recover" should have been given, and that the exceptions must be sustained.

Exceptions sustained.

ELIZABETH LEMON *vs.* COMMONWEALTH.
SOLOMON LEMON *vs.* SAME.

Essex. November 12, 1920. — January 4, 1921.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Commonwealth. Way, Public: defect in State highway.

The Commonwealth can be impleaded in its own courts only in the manner, to the extent and for the causes expressed in the statutes granting consent thereto.

Under St. 1917, c. 344, Part I, § 16, creating a liability on the part of the Commonwealth for defects in State highways but providing that "The Commonwealth shall not be liable for an injury which may be sustained . . . during the construction, reconstruction or repair of such highway . . ." the Commonwealth is not liable for injuries caused by a vehicle colliding in the night time with an iron horse, which was left unlighted after it had been placed as a barrier across the half of a much travelled State highway upon which the vehicle rightfully was travelling and whose warning legend, that the highway was "under construction," could not be read because of the darkness, although the actual work upon the highway was being done one hundred and fifty feet beyond the place where the barrier stood.

PETITIONS, filed in the Superior Court under R. L. c. 201, § 1; Sts. 1905, c. 370, § 1; 1917, c. 344, Part I, § 16, the first for personal injuries and the second for personal injuries and damage to the petitioner's motor car resulting from a collision in the night time on September 11, 1917, with an iron horse barring a part of the State highway in the town of Spencer.

In the Superior Court the petitions were heard together by *McLaughlin,* J., without a jury. Material facts found by him are described in the opinion. The judge found for the respondent in both cases and, at the request of all parties, reported the cases to this court for determination.

W. A. Pew & A. W. Putnam, for the petitioners, submitted a brief.

A. E. Seagrave, Assistant Attorney General, for the Commonwealth.

PIERCE, J. These cases are before this court on a report of a judge of the Superior Court, after a hearing on the petitions of a husband and wife to recover damages for injuries, to the

personal property of the husband and to the person of the wife, while they were travelling on the State highway, in the town of Spencer.

The following facts, in substance, are shown by the report: On September 11, 1917, between half past eight and nine o'clock in the evening, the petitioners were travelling in an automobile from Springfield to Salem on the State highway in the town of Spencer. They ran into an iron horse, about eight feet long, which had been placed by the employees of the Massachusetts Highway Commission in the road upon which the petitioners were travelling. At the time of the collision there were no lights on the horse and the night was dark, but pleasant. Proper and sufficient lights were placed on the horse at sundown previous to the accident, but three or four hours later, at half past eight or nine o'clock in the evening, when the accident happened, none of the lanterns was lighted and one was missing. The highway is a main thoroughfare between Worcester and Springfield, and the volume of travel is very large, both day and night, at the season of the year when the petitioners were injured. No precautions were taken to prevent the removal or extinguishment of lights, nor in the event of such removal or extinguishment to ascertain the fact and replace or relight them. The horse with which the petitioners collided was on the southerly side of the road, directly in their path, blocking about eight feet of the road on its southern side. It stood one hundred and fifty feet to the west of a section of the road which was undergoing repairs. Employees of the highway commission had dug out the southern half of this section preparatory to filling it in with rocks and raising the grade, and the work was going on solely on that half of the road, the northern half remaining open for travel. Upon the horse was a printed sign, stating that the highway was "under construction," but the sign was not read and could not have been read by the petitioners previous to the accident on account of the darkness. As the petitioners approached the barrier an automobile was coming along the northern side of the road from an opposite direction, throwing a bright headlight on the faces of the petitioners.

It is familiar law that the Commonwealth can be impleaded in its own courts only in the manner, to the extent, and for the causes expressed in the statute granting consent thereto. *McArthur*

Brothers Co. v. *Commonwealth*, 197 Mass. 137. *Burroughs* v. *Commonwealth*, 224 Mass. 28, 29. The distinct and determinate statute to which alone the petitioners can look for such a consent is St. 1917, c. 344, Part I, § 16. That section, so far as it has application to the undisputed facts, reads as follows: "The Commonwealth shall be liable for injuries sustained by persons while travelling on State highways, if the same are caused by defects within the limits of the constructed travelled roadway, in the manner and subject to the limitations, conditions, and restrictions specified in sections twenty-four, twenty-six and twenty-seven of Part 4 of this act. . . . The Commonwealth shall not be liable for an injury which may be sustained upon the sidewalk of a State highway or during the construction, reconstruction or repair of such highway. . . ."

Had the Commonwealth consented to place itself on the same statutory footing as municipal corporations are placed by law in relation to the imposed duty to keep the streets and ways reasonably safe and convenient for travellers with their horses, teams and carriages, at all seasons of the year, on the reported facts it could reasonably be said that the evidence warranted a finding of due care on the part of the petitioners and of negligence on the part of the respondent. *Fox* v. *Chelsea*, 171 Mass. 297. *Burditt* v. *Winchester*, 205 Mass. 493.

We are unable to agree with the contention of the petitioners to the effect that the only reasonable and fair construction to give to the language of the statute excluding the Commonwealth from liability for injuries to travellers upon State highways during the construction, reconstruction or repair of those highways, requires that the exemption be limited to that part of the way which is immediately in process of change, and does not relieve the Commonwealth from liability or extend to the approaching way or to barriers thereon one hundred and fifty feet distant, even though that way and the barrier are incidental and necessary to the execution of the work and afford a warning and protection to travellers who otherwise might come upon a disturbed and dangerous way.

The sitting judge at the close of the evidence in both cases, found for the respondent on the ground that the accident happened "during the reconstruction or repair of the highway" within the

meaning of the statute. We think no other result was possible. It follows, in accordance with the terms of the report, judgment is to be entered for the respondent in each case.

So ordered.

GEORGE POULETTE *vs.* NAZAIRE CHAINAY.

Bristol. November 16, 1920. — January 4, 1921.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Partnership. Equity Jurisdiction, Accounting between partners. *Equity Pleading and Practice,* Exception to master's report.

Where, at the hearing by a master of a suit in equity for a partnership accounting, it appears that both partners were illiterate and that no real system of bookkeeping was employed; that for the whole period of the partnership the books were not continuous, regularly kept, complete nor reliable, which was due to the carelessness or lack of knowledge of the partners, and that, during a time when the plaintiff was absent and the business was in charge of the defendant, the same bookkeeper was employed and the same methods of bookkeeping were adopted as when the business was under the direction and control of the plaintiff, the master properly may refuse to hold the defendant responsible for neglect to keep proper books of account which would show in what way were disbursed daily receipts received by the defendant during the period when the plaintiff was not present to take care of his own interests.

An exception to a refusal of a master to make a certain finding of fact must be overruled where the evidence before the master is not reported.

BILL IN EQUITY, filed in the Superior Court on June 4, 1919, for a partnership accounting.

The suit was referred to a master. Material findings by the master are described in the opinion. The plaintiff's first exception to the master's report, referred to in the opinion, was to his "refusal to hold the defendant responsible for the defendant's neglect to keep proper books of account which would show in what way were disbursed the $42,781.69 daily receipts received by the defendant during the period from March 20, 1918, to November 20, 1918, while the plaintiff was not present to take care of his own interests."

The suit was heard by *Cox*, J., and by his order there were

entered an interlocutory decree overruling exceptions by the plaintiff to the master's report and confirming the report and a final decree directing the payment from the partnership assets of $40.70 to the plaintiff, and of $1,809.69 to the defendant. The plaintiff appealed.

The case was submitted on briefs.

C. F. Archambault & H. E. Woodward, for the plaintiff.

A. Auger, for the defendant.

CROSBY, J. The plaintiff and the defendant entered into a partnership on March 20, 1915, for the purpose of conducting a retail bakery. The partnership was dissolved by mutual consent on May 16, 1919, and the assets of the firm were transferred to one Balthazar, who was to dispose of them in accordance with an agreement of the parties. The bill is for an accounting. The case was referred to a master, who filed a report; the plaintiff's exceptions thereto have been overruled, the report has been confirmed, and a final decree has been entered in accordance with the findings.

The master found that both partners were illiterate and that no real system of bookkeeping was employed; that the books were not continuous nor regularly kept; that for the whole period of the partnership the books were not complete nor reliable, and that this was due to the carelessness or lack of knowledge of the partners; that during the time the plaintiff was absent and the business was in charge of the defendant, the same bookkeeper was employed, and the same methods of bookkeeping were adopted, as when the business was under the direction and control of the plaintiff. In view of the findings, the plaintiff's first exception cannot be sustained.

The remaining exceptions relate to the failure of the master to make certain findings of fact, and must be overruled. The evidence is not reported, and we cannot revise the findings unless they are shown by the report to be plainly erroneous, which does not appear. *Thompson* v. *Davis*, 225 Mass. 385. *Greenhood* v. *Richardson*, 226 Mass. 208.

The exceptions to the master's report must be overruled, and the decree affirmed with costs.

So ordered.

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ABATEMENT.

See appropriate subtitles under PRACTICE, CIVIL, and PRACTICE, CRIMINAL.

ABUSE OF LEGAL PROCESS.

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

ACCOMPLICE.

Accomplice as witness, see appropriate subtitle under WITNESS.

ACTIONABLE TORT.

Evidence which was held insufficient to enable the owner of a building to maintain against a lessee of a portion thereof, who, under a claim of right but wrongfully, is occupying a part of the basement under the premises leased to him, an action for malicious interference, through persistence in wrongful occupancy of the space in the basement, with the making by the owner of a contract of letting of another portion of the building to a third person who required the space for his use. *Goldsmith* v. *Traveler Shoe Co.* 111.

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

ADMIRALTY.

The provisions of the workmen's compensation act are not operative in favor of a dependent of an employee of a subscriber under the act who lost his life from causes arising out of and in the course of his employment as mate upon a steam lighter used by the employer in coastwise traffic for the transportation of sand and gravel between Scituate and Boston and while the vessel was within three miles of shore. *Dorman's Case*, 583.

ADVERSE POSSESSION OR USE.

No title to any of the province lands lying below high water mark could be acquired by adverse possession previous to the enactment of St. 1893, c. 470; and, by reason of the repeal of that statute by R. L. c. 227, in 1902, its provisions did not permit the acquiring of such a title by adverse possession for twenty years preceding its repeal. *Sklaroff* v. *Commonwealth*, 87.

St. 1893, c. 470, gave no right based on adverse possession of province land preceding its enactment. *Ibid.*

AGENCY.

Existence of Relation.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate, that findings would have been warranted that the plaintiff was the efficient cause in inducing the purchase at the defendant's price, that the defendant's husband had told her of the employment of the plaintiff as a broker and that, knowing of the acts of her husband in her behalf and keeping silent, she had ratified and adopted his contract with the plaintiff. *Nielson, petitioner*, 1.

Evidence in an action by a husband and wife jointly against a stockbroker for money paid in transactions alleged to have been of the character described in R. L. c. 99, § 4, which was held a sufficient basis for a finding that the husband acted as the agent for his wife and that his intention bound the defendant so far as her interests were affected. *Barrell* v. *Paine*, 157.

Evidence in proceedings under the workmen's compensation act to recover compensation for injuries sustained by a teamster while unloading wool at a warehouse of a firm to which he had been directed to deliver wool by a firm other than his general employer upon which it was held that in the absence of evidence showing control of the teamster by the second firm, it was presumed that authority over him remained in the general employer. *Hogan's Case*, 241.

In the above described proceedings it was held that a finding was warranted that the teamster when injured was in the employ of his general employer. *Ibid.*

Scope of Authority or Employment.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for

procuring a sale of the real estate, that findings would have been warranted that the plaintiff was the efficient cause in inducing the purchase at the defendant's price, that the defendant's husband had told her of the employment of the plaintiff as a broker and that, knowing of the acts of her husband in her behalf and keeping silent, she had ratified and adopted his contract with the plaintiff. *Nielson, petitioner*, 1.

Evidence upon which it was held that injuries received by an employee in the dyeing room of a textile factory, whose duty was the operation of two machines known as "jigs," and who went upon the roof to remedy a defect in certain ventilators and was injured by a fall while so doing, must be held not to have arisen out of or in the course of his employment. *Koza's Case*, 342.

A request for a ruling at the trial of an action for deceit, where it appears that false representations, which were relied on by the plaintiff as the foundation of the action, were not made by the defendant but were made by his agent acting within the scope of his authority which it is not error to refuse. *Howe* v. *Johnson*, 379.

Where a policy of life insurance provides that premiums shall be paid weekly and that a "grace of four weeks shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force," a certain authorization by the insurance company of its agents to collect premiums not more than thirteen weeks in arrears upon which payment the former insured shall "be regarded as having been wholly restored to benefit," it was held does not require an agent to accept such payment of overdue premiums. *Hayes* v. *Metropolitan Life Ins. Co.* 476.

Provisions in a policy of life insurance relative to authorization of changes therein upon which evidence at the trial of an action upon the policy tending to show that a collecting agent of the company told the beneficiary that the policy did not lapse until thirteen weeks' payments were overdue was held not to be sufficient to modify the policy or to constitute a waiver of its provisions. *Ibid.*

Agent's Compensation.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate, that the proposed bill of exceptions was not conformable to the truth, and that the petition must be dismissed. *Nielson, petitioner*, 1.

A contract between a corporation and two of its officers for commissions to be paid in compensation for their services in connection with the sale of certain real estate which in an action for the commissions it was held was not invalid on its face. *Adams* v. *East Boston Co.* 121.

Evidence in the action above described upon which it was held that the contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom a proposed statute was to be presented, and therefore was unenforceable because contrary to public policy. *Ibid.*

In the above described action it also was held that it is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts,

inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity. *Adams* v. *East Boston Co.* 121.

In an action of contract, where it appeared that the plaintiff who had been employed by the owner of certain property to find a purchaser of the property for him, and who had transmitted an offer to the defendant which was accepted, agreed to release the owner from his claim for services and commission in consideration of the defendant's promise to pay it, and that the defendant so agreed with the plaintiff, who released the owner, the owner stating that the arrangement was satisfactory to him it was held that by the agreement of the three parties, a novation was effected by which the owner was discharged from liability to the plaintiff and the defendant by his promise was substituted as the plaintiff's debtor. *Curran* v. *O'Donnell*, 357.

Liability of Agent on Contract.

Evidence in an action by an automobile dealer against an insurance agent for breach of an oral agreement to procure and deliver to the plaintiff a valid policy of insurance against fire upon certain automobiles upon which it was held that a verdict properly was ordered for the defendant. *Cass* v. *Lord*, 430.

Where an agent acts within the scope of his authority for a disclosed principal, he does not bind himself unless it appears that he expressly agreed to become personally responsible. *Ibid.*

Agent's Knowledge.

Evidence at the hearing above described which it was held did not as a matter of law require a finding by the judge that the broker of the lessor knew that the premises were to be used by the plaintiff days and nights without interruption. *New York Central Railroad* v. *Stoneman*, 81.

Agent Improperly Influencing Legislation.

Evidence in an action for commissions earned under a contract in writing between a corporation and two of its officers for services rendered and to be rendered in the sale of certain real estate upon which it was held that the contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom a proposed statute was to be presented, and therefore was unenforceable because contrary to public policy. *Adams* v. *East Boston Co.* 121.

In the above described action it also was held that it is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts, inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity. *Ibid.*

Ratification or Repudiation of Agent's Acts by Principal.

The bringing by the lessor named in a lease in writing and under seal of an action against the lessee for breach of the contract to pay rent is a ratifica-

tion by the lessor of the signing, sealing and delivery of the lease in his name, although it was so executed and delivered by one who had no authority to do so. *Gross* v. *Cohen*, 468.

The execution and delivery of a lease of real estate on behalf of the lessor by one who had no authority so to do may be ratified by the lessor although the instrument contains no statement that it was executed by an agent. *Ibid.*

Officers and Agents of Corporations.

See appropriate subtitle under CORPORATION.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

Real Estate Broker.

See BROKER.

AMENDMENT.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL.

APPEAL.

An appeal which seeks to raise a question wholly moot does not present a question of law proper for this court to determine. *Chase* v. *Russell*, 417.

See also that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

APPRENTICE.

Provisions in a contract in writing between a father, his minor son and the son's employer, a corporation, whereby the son became an apprentice to the employer for three years to learn the trade of a machinist, upon which in an action by the employer against the father for breach of the contract it was held that there was a consideration for the contract as between the employer and the father. *Putnam Machine Co.* v. *Mustakangas*, 376.

In the above described action it was held that although the contract was not a statutory indenture of the apprenticeship nor made in accordance with the provisions of R. L. c. 155, it was valid and enforceable at common law by the employer against the father. *Ibid.*

In the above described action it was held that not being a statutory agreement

of apprenticeship, the employer was not compelled by R. L. c. 155, § 11, to seek redress in the Probate Court, but might proceed at common law. *Putnam Machine Co.* v. *Mustakangas*, 376.

In the above described action it was held that a provision in the contract for liquidated damages was valid. *Ibid.*

ARCHITECT.

The mere fact, that a city received benefit from services rendered to it by an architect, does not render the city liable to pay for such services if it appears that they were rendered at the request of, and under an agreement purporting to have been made in its behalf by, persons acting without authority conferred by express provisions of a statute or by necessary implication from such provisions. *Simpson* v. *Marlborough*, 210.

By the provision of the charter of the city of Marlborough, above mentioned, the school committee is given no authority either expressly or by implication to employ an architect to prepare plans and specifications for the erection of a school house. *Ibid.*

ARREST.

It is an essential element of a warrant for an arrest in a criminal case that it be directed to some officer or class of officers and not to a department, an organization, or an official or unofficial body. *Graves's Case*, 493.

ASSESSMENT.

See Tax.

ASSIGNMENT.

The mere fact that, after the entry of a judgment in an action of tort and the issuance of an execution for its enforcement, the judgment creditor by an instrument in writing and under seal assigned to a third person the judgment debt, is no defence to an action brought in the name of the judgment creditor upon a recognizance, entered into by the judgment debtor and a surety when, after the assignment was made, the debtor was arrested upon the execution, it being necessary that the recognizance be based on the record of the judgment and it not being necessary for the assignee to bring the action thereon in his own name. *Brazill* v. *Green*, 93.

ATTACHMENT.

Where a claim of a municipal officer to compensation for his services is based, not merely on a statutory provision but also upon an enforceable obligation of the corporation, although that obligation is one entered into under statutory authority or direction, such claim in legal effect is upon an express contract and an amount so due may be attached in an action by trustee process against the officer as defendant and the municipality as

trustee. Walter v. Cook, 129 Mass. 577, distinguished. *Hooker* v. *McLennan*, 117.

A bill in equity under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1908, c. 544, § 23; 1910, c. 531, § 2, cannot be maintained to reach and apply, in payment of a debt due to the plaintiff from the principal defendant, salary due to that defendant as first assistant assessor of taxes of the city of Boston, such salary being attachable by trustee process. *Ibid.*

An attachment of real estate made by virtue of a writ which never was entered in court has no validity although it is not discharged of record. *Solovicos* v. *MacLachlan*, 402.

Where a creditor of a corporation named "D Trucking, Inc.," brought a bill in equity to reach and apply in payment of the debt property in the possession of a third person not attachable at law, and in the bill described the debtor as "D Trucking Co., Inc.," although he intended to describe "D Trucking, Inc.," and later a trustee process was served upon the third party as trustee in an action at law by another creditor against the same debtor, in which the debtor was correctly described, the plaintiff in the suit in equity was permitted to amend his bill so that it correctly described the debtor and a final decree was ordered directing that his claim be paid first from the fund, the second creditor appealed and it was held that the amendment properly was allowed, since it resulted in the correction of a mere clerical error or misnomer without creating an actual change of existing parties or introducing a new demand or cause of action. *Connelly* v. *Dionne Trucking, Inc.* 460.

ATTORNEY AT LAW.

Amount of Compensation.

Where the plaintiff in a pending suit in equity against his copartners gave the attorney representing him in the suit a mortgage of his interest in certain real estate, which was partnership property and was described in the bill in equity as such to secure the payment of a note, given by him to his counsel for services rendered and to be rendered in the suit it was held, that as counsel for the plaintiff, the mortgagee had actual notice of the pendency of the proceedings. *Steele* v. *Estabrook*, 252.

Where a judge, who heard a "supplemental bill" to discharge the mortgage above described, reported the case to this court for determination and it did not appear from the report that the value of the mortgagee's services as counsel was determined it was held that, under the circumstances, a provision for the payment to him, instead of to the plaintiff, of a sum which the final decree in the main suit had directed to be paid by the defendants to the plaintiff should not be included in the decree. *Ibid.*

In the suit above described it was held that the mortgage was not valid against the defendants. *Ibid.*

In the suit above described it was held that a decree should be entered directing the discharge of the mortgage. *Ibid.*

An exception to a refusal by a single justice, hearing an appeal from a decree of the Probate Court modifying a final account of an executor by lessening the amount allowed for services and disbursements of counsel, to rule that the amounts charged in the account for such items were not unreasonable, brings to this court no question of law. *Wordell* v. *Grim*, 406.

Petition for Admission or Reinstatement.

A proceeding by an attorney at law for admission to the bar is a proceeding at law and not in equity. *De Propper, petitioner*, 500.

The record upon an appeal from the denial of a petition for the admission or reinstatement of an attorney at law as a member of the bar should include no part of the evidence introduced at the hearing of the petition. *Ibid.*

A record, which merely shows a dismissal, after a hearing, of a petition for the admission or reinstatement of an attorney at law as a member of the bar and an appeal therefrom, discloses no error of law. *Ibid.*

ATTORNEY GENERAL.

An information in the nature of a quo warranto may be brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and prerogatives of a municipal corporation have been usurped. *Attorney General* v. *Methuen*, 564.

The granting of relief in quo warranto proceedings instituted by the Attorney General on behalf of the Commonwealth, even when sought at the instance of the Attorney General in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion. *Ibid.*

An information of the nature above described must be presented by and on behalf of the Commonwealth and by and under the immediate supervision of the Attorney General, and in that way alone. *Ibid.*

In the proceedings above described it was held that if the name of the relator be rejected as surplusage, enough remained in the record to show that the information was filed by the Attorney General in behalf of the Commonwealth. *Ibid.*

AUDITOR.

See appropriate subtitle under PRACTICE, CIVIL.

AUTOMOBILE.

See MOTOR VEHICLE.

BILLS AND NOTES.

Validity.

The following instrument is a negotiable promissory note: "On demand after date I promise to pay to the order of Ann Maria Sprague One thousand Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society." *Goodfellow* v. *Farnham*, 453.

The following instrument is a negotiable promissory note: "On demand after date I promise to pay to the order of Ann Maria Sprague Four hundred Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society." *Ibid.*

Consideration.

A partial failure of the consideration of a promissory note, in order to be relied on by the maker under R. L. c. 73, § 45, in defence to an action upon the note by the payee, must be alleged specifically in the answer. *Indiana Flooring Co.* v. *Rudnick*, 90.

Where, in an action upon a promissory note by the payee against the maker, the answer contains no specific allegation of a partial failure of consideration, the judge properly may refuse to instruct the jury that, "If from the evidence you find that the notes were given in accordance with an agreement for lumber to be delivered in the future, then the burden of proof is upon the plaintiff to show that it actually did send and deliver the lumber of the kind, quality and quantity called for by said agreement," such defence not being open on the pleadings and the burden of establishing such a defence, if properly pleaded, being upon the defendant. *Ibid.*

Payment.

If, after a mortgagee of real estate who has made an ineffectual foreclosure of the mortgage by entry, later makes another entry and sells the property at foreclosure sale for an amount which, with the rents and profits received since the first entry, was insufficient to satisfy the mortgage note, he may maintain an action for the balance still due upon the note, the first entry and possession for three years thereafter not operating to discharge the note. *Fitchburg Co-operative Bank* v. *Normandin*, 332.

BONA FIDE PURCHASER.

A mortgage of an interest in certain partnership real estate given by the plaintiff to the attorney representing him for services in a suit which was pending against the plaintiff's alleged copartners which was held not valid against the defendants, the mortgagee as counsel having actual knowledge of the pendency of the proceedings and the real estate being therein described as partnership property. *Steele* v. *Estabrook*, 252.

BOSTON FIREMEN'S RELIEF FUND.

A member of the repair and construction division or of the veterinary service or of the fire alarm branch of the fire department of the city of Boston is, under St. 1909, c. 308, as amended by St. 1911, c. 134, a member of "said department" and entitled to vote for the twelve members of that department, who, with the fire commissioner, constitute The Boston Firemen's Relief Fund; and if the corporation denies to him that right, a writ of mandamus may be issued upon his petition to compel the corporation to recognize it. *Nolan* v. *Boston Firemen's Relief Fund*, 420.

It is not a condition precedent to the granting of the petition for a writ of mandamus above described that the petitioner shall have made an express demand upon the corporation for the recognition of his right if it appears that such a demand would have been futile. *Ibid.*

BRIDGE.

A part of the expense of rebuilding a highway bridge over a railroad or of making any structural change or renewal for the purpose of strengthening or improving it upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, may be assessed upon the railroad corporation although it receives no benefit therefrom. *Selectmen of Brookline, petitioners*, 260.

Action against a county and a street railway company to recover for the death of one riding a motorcycle at a draw in Plum Island Bridge. *Braley* v. *Massachusetts Northeastern Street Railway*, 275.

BROKER.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate, that the proposed bill of exceptions was not conformable to the truth, and that the petition must be dismissed. *Nielson, petitioner*, 1.

STOCKBROKER, see that title.

CARRIER.

A provision in a contract made by a railroad corporation in the State of Illinois for the shipment of live stock from Chicago in that State to Boston which it was held was valid and, in the absence of wanton or reckless misconduct on its part, relieved the corporation from any duty at common law to the shipper and to the consignee to load and to take care of and to feed and water the live stock while in transportation under the contract. *New York Central Railroad* v. *Sturtevant & Haley Beef & Supply Co.* 16.

In an action by the railroad corporation against the consignee of certain cattle shipped under a contract containing the provision above described for the value of two hundred pounds of hay per each carload, placed by the railroad corporation in each car in excess of one hundred pounds of hay, its former standard of feeding, to comply with a ruling of the department of agriculture without force of law and contrary to the direction of the shipper, it was held that the railroad corporation after the demand by the shipper had no authority from him to furnish feed beyond what was reasonably adequate for the special needs of the cattle. *Ibid.*

In the above described action it also was held that the railroad corporation did not have a right, superior to that of the shipper, to dictate what was a reasonable amount of feed to be given to the cattle while in transportation. *Ibid.*

In the above described action evidence of the method of feeding and directions given by the shipper both before and after a change in the method of feeding employed by the railroad corporation which was held relevant upon the issues raised by the plaintiff and admitted properly. *Ibid.*

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CHILD.

See PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLERK OF COURTS.

The duty of preparing the copies of papers and the records of cases brought to this court by appeal or upon exceptions, reports or reservations, is placed by R. L. c. 157, § 21; c. 173, § 117, directly, unequivocally and exclusively upon the clerk; and the Superior Court has no jurisdiction or power to order that an appellant be allowed to take the files of a case and to have them printed under his own direction, and to permit printing by multigraph or other duplicating machine. *De Propper, petitioner*, 500.

COMMONWEALTH.

St. 1893, c. 470, gave no right based on adverse possession of province land preceding its enactment. *Sklaroff* v. *Commonwealth*, 87.

No title to any of the province lands lying below high water mark could be acquired by adverse possession previous to the enactment of St. 1893, c. 470; and, by reason of the repeal of that statute by R. L. c. 227, in 1902, its provisions did not permit the acquiring of such a title by adverse possession for twenty years preceding its repeal. *Ibid.*

The Commonwealth can be impleaded in its own courts only in the manner, to the extent and for the causes expressed in the statutes granting consent thereto. *Lemon* v. *Commonwealth*, 599.

The Commonwealth is not liable for injuries caused by a vehicle colliding in the night time with an iron horse, which was left unlighted after it had been placed as a barrier across the half of a much travelled State highway which was being repaired and upon which the vehicle rightfully was travelling. *Ibid.*

CONSPIRACY.

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

CONSTABLE.

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate, of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated. *Coghlan* v. *White*, 165.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact and is for the jury, and is not one upon which the judge could make final determination. *Ibid.*

CONSTITUTIONAL LAW.

Police Power.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution. *Selectmen of Brookline, petitioners*, 260.

Due Process of Law.

Upon a certain petition in the Probate Court under R. L. c. 153, § 33, by a wife against her husband it was held that the respondent was not deprived of rights without due process of law but had full opportunity to be heard upon the issues which were shown by the petition. *Marshall* v. *Marshall*, 248.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution. *Selectmen of Brookline, petitioners*, 260.

Dane *v.* Treasurer & Receiver General, 234 Mass. 42, affirmed. *Dane* v *Treasurer & Receiver General*, 280.

Rules 52 and 28 of the Superior Court (1915), requiring a notice in writing of the filing of a bill of exceptions to be given to the adverse party, is well within the power of that court and a dismissal of exceptions for want of compliance therewith violates no constitutional right of the excepting party. *Day* v. *McClellan*, 330.

Article 5 of the Amendments to the Constitution of the United States does not apply to proceedings in the courts of the Commonwealth; and therefore a plea in bar to an indictment must be overruled if the ground of the plea is only that the defendants were lawfully summoned and were required to testify "at the sitting of the Grand Inquest" concerning the matters which were there inquired into and which were the subject matter of the indictment and that by the further prosecution of the indictment the defendants were "deprived of the privileges and immunities guaranteed" in that amendment to the Federal Constitution. *Commonwealth* v. *Leventhal*, 516.

It was said, that, on the plea in bar above described, the questions, whether the defendants when compelled to testify before the grand jury were deprived of their rights under art. 12 of the Declaration of Rights of our Commonwealth, and the extent to which their general plea of not guilty was a waiver of their rights, were not before this court. *Commonwealth* v. *Leventhal*, 516.

Although participation in the provisions as to compensation in the workmen's compensation act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the General Court with relation to past events. *Devine's Case*, 588.

No constitutional right of a widow of an employee claiming compensation under the workmen's compensation act by reason of his death, which she alleged resulted on October 18, 1917, from injuries received on May 14, 1917, was impaired by the enactment on May 24, 1917, of St. 1917, c. 297, described above, nor by her claim being referred thereunder for hearing by a single member of the Industrial Accident Board instead of by a committee on arbitration appointed under § 6 of Part III of the act as amended by St. 1912, c. 571, § 11, which was in force at the time the alleged injury occurred. *Ibid.*

Equal Protection of Laws.

In an action of contract or tort between two mining corporations, not incorporated in this Commonwealth, for the alleged conversion of ore from veins, lodes and ledges which had their apexes within the plaintiff's surface boundaries in Arizona and for money had and received from its sale, a determination that the courts of this Commonwealth will not take jurisdiction of such an action, the primary question involved being title to real estate, it being one local to the State of Arizona, violates no constitutional right of the plaintiff given either by art. 14 of the Amendments to the Federal Constitution or by art. 4, § 2, of that Constitution. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185

Dane *v.* Treasurer & Receiver General, 234 Mass. 42, affirmed. *Dane* v. *Treasurer & Receiver General*, 280.

Impairment of Obligation of Contracts.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution. *Selectmen of Brookline, petitioners*, 260.

Although participation in the provisions as to compensation in the workmen's compensation act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the General Court with relation to past events. *Devine's Case*, 588.

Equality of Privilege.

In an action of contract or tort between two mining corporations, not incorporated in this Commonwealth, for the alleged conversion of ore from veins,

lodes and ledges which had their apexes within the plaintiff's surface boundaries in Arizona and for money had and received from its sale, a determination that the courts of this Commonwealth will not take jurisdiction of such an action, the primary question involved being title to real estate, it being one local to the State of Arizona, violates no constitutional right of the plaintiff given either by art. 14 of the Amendments to the Federal Constitution or by art. 4, § 2, of that Constitution. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185.

Trial by Jury.

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt, wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional. *Walton Lunch Co.* v. *Kearney*, 310.

General Court.

Prerequisites for jurisdiction of the General Court under art. 2 of the Amendments to the Constitution to constitute a city government in a town. *Attorney General* v. *Methuen*, 564.

Concurrent Power.

Statement by RUGG, C. J., of different judicial definitions of the word "concurrent." *Commonwealth* v. *Nickerson*, 281.

Since, at the time of the adoption of art. 18 of the Amendments to the Constitution of the United States, there was no such universal or settled definition of the word "concurrent" as to lead to the conviction that it was employed in § 2 of the amendment in reliance upon a judicially established meaning, its meaning as there used must be determined from its context, the purpose sought to be accomplished and a consideration of authoritative adjudications where the discussion of kindred constitutional problems has been involved. *Ibid.*

By the words of § 2 of art. 18 of the Amendments to the Constitution of the United States, the Commonwealth possesses a continuous and independent power to enact legislation actually tending to render efficient, through its executive and judicial departments, the terms of that amendment, which legislation, in definitions, administrative agencies and penalties, may differ from but cannot be antagonistic to legislation enacted by Congress to carry out the purposes of the amendment. *Ibid.*

State legislation, so far as in its practical operation it is appropriate to enforce the chief aim of art. 18 of the Amendments to the Constitution of the United States and to make it more completely operative in all its amplitude, is not suspended, superseded, set aside nor rendered inapplicable in its denouncements by 41 U. S. Sts. at Large, 305, known as the Volstead act, in so far as

it is not incompatible with or in contravention of the provisions of that federal statute. *Commonwealth* v. *Nickerson*, 281.

Provisions of R. L. c. 100, which remain in effect since the adoption of art. 18 of the Amendments to the Constitution of the United States and the enactment of the Volstead act, 41 U. S. Sts. at Large, 305, and which the courts of the Commonwealth have power and jurisdiction to enforce. *Ibid.*

The provisions of R. L. c. 100, which aim at the suppression of sales of liquor containing more than one per cent of alcohol remain in force, since they tend toward the same result as that sought by the Volstead act and seek to attain that result by means in harmony with its provisions. *Ibid.*

The definition of intoxicating liquor in R. L. c. 100, § 2, manifests but a small practical difference from that in Title II, § 1, of 41 U. S. Sts. at Large, 305, the Volstead act, cannot be said as matter of law to include liquor in fact intoxicating, is not unreasonable, does not authorize that which the Volstead act forbids but merely fails to punish some conduct which the Volstead act denounces, provides rational and effective means for the enforcement of the chief aim of art. 18 of the Amendments to the Federal Constitution, and therefore is not obstructive of the provisions of and the purposes sought by the amendment and the Volstead act. *Ibid.*

The provisions of R. L. c. 100, concerning the prohibition of sales of intoxicating liquor, the definition of intoxicating liquor, the penalties for the violations of these and similar provisions, and the means of enforcing them, constitute an exercise of the legislative power of the Commonwealth which, under § 2 of art. 18 of the Amendments to the Federal Constitution, giving to Congress and the several States "concurrent power" to enforce the article by appropriate legislation, the courts of this Commonwealth still have power and jurisdiction to enforce. *Ibid.*

The circumstance that R. L. c. 100 was enacted and was in force previous to the adoption of art. 18 of the Amendments to the Federal Constitution, does not prevent the above described provisions of that statute from being "appropriate legislation," by which, under the "concurrent power" granted by § 2 of the amendment, the amendment may be enforced by the Commonwealth. *Ibid.*

A sale of whiskey would be a violation of those provisions of R. L. c. 100, which remain enforceable since the enactment of the Volstead act, both because, being a "distilled spirit," whiskey is included in the definition of intoxicating liquor in § 2 of that statute as well as by name in the definition in § 1 of Title II of the Volstead act, and because, as a matter of common knowledge, it is an intoxicating liquor. *Ibid.*

Public Service Corporation.

A railroad corporation is a creature of the Commonwealth engaged in the doing of a public business and is bound by any reasonable statutes for the regulation of this business which the Legislature chooses to enact. *Selectmen of Brookline, petitioners*, 260.

Incorporation of Town as City.

In quo warranto proceedings brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and pre-

rogatives of a municipal corporation have been usurped in which it is alleged that a statute incorporating a town as a city was invalid because contrary to art. 2 of the Amendments to the Constitution, the municipality nominally and in fact exercising the franchises and prerogatives alleged to have been usurped may be made the party defendant. *Attorney General* v. *Methuen*, 564.

Prerequisites for jurisdiction of the General Court under art. 2 of the Amendments to the Constitution to constitute a city government in a town. *Ibid.*

Subsequent approval or ratification by a town, at a meeting "duly warned and holden," of action of the General Court purporting to constitute it a city without the making of the precedent application in accordance with the request or consent of the voters required by art. 2 of the Amendments to the Constitution, will not validate such action. *Ibid.*

Proceedings at annual town meetings of the inhabitants of Methuen resulting in an application to the Legislature for a limited town meeting form of government and the enactment of Spec. St. 1916, c. 116, which was duly accepted by the town, which it was held did not fulfil the requirements of art. 2 of the Amendments to the Constitution, so that a contention to the effect that the form of town government was so changed that a further change by the enactment of Spec. St. 1917, c. 289, without observance of the requirements of art. 2 of the Amendments to the Constitution, was valid, had no relevancy. *Ibid.*

A vote of a public meeting in the town hall of Methuen, which was favorable to the enactment of a bill to institute a city government in the town, which it was held was not an application for such action to the General Court by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by art. 2 of the Amendments to the Constitution. *Ibid.*

Circumstances under which this court, while determining that the statute was invalid, held that granting the relief sought in an information in the nature of a quo warranto filed by the Attorney General based upon allegations that the statute was invalid because the requirements of art. 2 of the Amendments to the Constitution were not observed would not be a discreet exercise of judicial power nor in conformity to the general public interest. *Ibid.*

Taxation.

Dane *v.* Treasurer & Receiver General, 234 Mass. 42, affirmed. *Dane* v. *Treasurer & Receiver General*, 280.

CONTEMPT.

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt, wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation is unconstitutional. *Walton Lunch Co.* v. *Kearney*, 310.

CONTRACT.

What constitutes.

In a suit in equity for the cancellation of a deed to certain real estate and for a reconveyance where it appeared that the plaintiff offered to sell the real estate for $6,000 and the defendant through a misunderstanding supposed the price was $3,000 and accepted a deed of the property it was held that there was no meeting of minds and no completed contract and that the plaintiff was entitled to relief. *Neel* v. *Lang*, 61.

In an action of contract, where it appeared that the plaintiff who had been employed by the owner of certain property to find a purchaser of the property for him, and who had transmitted an offer to the defendant which was accepted, agreed to release the owner from his claim for services and commission in consideration of the defendant's promise to pay it, and that the defendant so agreed with the plaintiff, who released the owner, the owner stating that the arrangement was satisfactory to him, it was held that the promise by the defendant was for a consideration. *Curran* v. *O'Donnell*, 357.

In the action above described it was held that by the agreement of the three parties, a novation was effected by which the owner was discharged from liability to the plaintiff and the defendant by his promise was substituted as the plaintiff's debtor. *Ibid.*

In the above described action it was held that the plaintiff was entitled to recover. *Ibid.*

A contract in writing, purporting to be between a corporation and an individual, may be enforced by the corporation against the individual if he signed it and it was assented to and accepted by the corporation, even if the corporation's name never was signed to it. *Putnam Machine Co.* v. *Mustakangas*, 376.

In an action upon a policy of insurance against loss by fire issued to an automobile dealer and providing that it should "attach and cover upon automobiles, bodies, chassis, tops or other equipment while attached to and a part of automobiles owned by the assured and held by him for sale" it was held that the words, "automobiles owned by the assured and held by him for sale" were not ambiguous: and that evidence of negotiations and conversations preceding the issuing of the policy or following its issuance and before a fire within its terms, which tend to modify or vary its terms, were not admissible. *Cass* v. *Lord*, 430.

Consideration.

Provisions in a contract in writing between a father, his minor son and the son's employer, a corporation, whereby the son became an apprentice to the employer for three years to learn the trade of a machinist, upon which in an action by the employer against the father for breach of the contract it was held that there was a consideration for the contract as between the employer and the father. *Putnam Machine Co.* v. *Mustakangas*, 376.

Validity.

A provision in a contract made by a railroad corporation in the State of Illinois for the shipment of live stock from Chicago in that State to Boston, which it was held was valid and, in the absence of wanton or reckless misconduct on its part, relieved the corporation from any duty at common law to the shipper and to the c nsignee to load and to take care of and to feed and water the live stock while in transportation under the contract. *New York Central Railroad* v. *Sturtevant & Haley Beef & Supply Co.* 16.

In the above described action it also was held that one hundred pounds of hay per carload at the point of rest having been found to have been reasonable and adequate for the special needs of the cattle and the shipper having demanded that no more be furnished by the railroad corporation on his account, the consignee was not liable for any feed furnished beyond that amount after the shipper's demand. *Ibid.*

Where the facts are not in dispute, the question, whether a contract is unenforceable because contrary to public policy, is a question of law under all the circumstances of the particular case. *Adams* v. *East Boston Co.* 121.

A contract between a corporation and two of its officers for commissions to be paid in compensation for their services in connection with the sale of certain real estate which in an action for the commissions it was held was not invalid on its face. *Ibid.*

Evidence in the action above described upon which it was held that the contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom a proposed statute was to be presented, and therefore was unenforceable because contrary to public policy. *Ibid.*

In the above described action it also was held that it is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts, inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity. *Ibid.*

A contract susceptible of two meanings, one lawful and the other not, will be supported rather than defeated, the presumption being, in the absence of something to show the contrary, that the parties intended to act in accordance with the law. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Recitals in a contract, that it was made with a view to stopping certain "controversies" between the parties as to certain land and certain "prosecutions" which had been "threatened" because of illegal attempts to remove bounds, and a certain conspiracy to deprive one of the parties to the contract of a right to exercise an option to purchase certain land, do not as a matter of law render the contract illegal, because they do not necessarily mean that the parties by their contract sought to stifle criminal prosecutions. *Ibid.*

The mere fact, that a city received benefit from services rendered to it by an architect, does not render the city liable to pay for such services if it appears that they were rendered at the request of, and under an agreement purporting to have been made in its behalf by, persons acting without authority conferred by express provisions of a statute or by necessary implication from such provisions. *Simpson* v. *Marlborough*, 210.

Provisions in a contract in writing between a father, his minor son and the son's employer, a corporation, whereby the son became an apprentice to the employer for three years to learn the trade of a machinist, upon which in an action by the employer against the father for breach of the contract it was held that although the contract was not a statutory indenture of apprenticeship nor made in accordance with the provisions of R. L. c. 155, it was valid and enforceable at common law by the employer against the father. *Putnam Machine Co.* v. *Mustakangas*, 376.

A provision for liquidated damages in the contract above described which it was held was valid. *Ibid.*

Construction.

In an action by the lessee against the lessor for damages resulting from a failure to supply heat, it was held that certain words stricken from a lease in writing before its execution could not be restored and could not be used in its construction. *Kennon* v. *Shepard*, 57.

In the above described action it also was held that the fair import of the words used was that, while the lessor promised to heat the premises, he was to be under no liability in case he failed to do so. *Ibid.*

In the same action it was held that the word "him" in the clause "without liability to him," referred to the lessee. *Ibid.*

Evidence in a suit in equity by a railroad corporation against a mortgagee in possession of certain real estate which the mortgagor had let to the plaintiff by a lease in writing whose provisions the mortgagee had agreed to be bound by, among others a provision relating to heat to be furnished by the lessor which was ambiguous as to whether the premises should be heated nights and on holidays and Sundays, upon which, on appeal, it was held that no error appeared in the findings or rulings of the judge ordering a final decree entered dismissing the bill. *New York Central Railroad* v. *Stoneman*, 81.

Evidence, at the hearing above described, of conversations between the defendant and his agent, which tended to explain certain conduct of the defendant and to show that it was not a construction of the contract favorable to the plaintiff, which it was held properly was admitted. *Ibid.*

A contract susceptible of two meanings, one lawful and the other not, will be supported rather than defeated, the presumptions being, in the absence of something to show to the contrary, that the parties intended to act in accordance with the law. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

A contract in writing and under seal, entered into between owners of adjoining land, for the conveyance of certain land which it was held was not a mere option to purchase. *Ibid.*

It was held that the contract above described created an equitable interest in land. *Ibid.*

Recitals in a contract, that it was made with a view to stopping certain "controversies" between the parties as to certain land and certain "prosecutions" which had been "threatened" because of illegal attempts to remove bounds, and a certain conspiracy to deprive one of the parties to the contract of a right to exercise an option to purchase certain land, do not as a matter of law render the contract illegal, because they do not necessarily

mean that the parties by their contract sought to stifle criminal prosecutions. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Provisions of an agreement entered into by a husband and wife with a trustee in settlement of a suit in the Probate Court for separate maintenance upon which in a libel for divorce it was held that the contract must be construed as being intended only to settle the husband's legal obligations while the marriage relation existed, and that it did not have divorce in view. *Kerr* v. *Kerr*, 353.

In the above described libel it was held that the power of the Superior Court upon granting the divorce also to make a decree for alimony and for suitable provision for the minor child was not abrogated by the agreement. *Ibid.*

In the above described libel the question whether the power of the Probate Court to increase the allowance it had decreed to the wife and child if, in circumstances arising after the decree, such sum became inadequate for their maintenance was limited by the contract of the parties with the trustee, not being raised by the record, was not considered. *Ibid.*

To what extent a contract of a husband and his wife with a trustee, which purported to provide for alimony to be paid to the wife in the event of a divorce afterwards being procured by her and which was made without the sanction of the court, might affect the power of the court to award alimony in such subsequent divorce suit, was not determined, the contract in question in this case contemplating the relations of the parties only during the continuance of the marriage relation. *Ibid.*

Provisions in a contract relative to a purchase and sale of real estate upon which it was held that the contract was not a mere option, but was one of purchase and sale binding both parties. *Morgan* v. *Forbes*, 480.

Evidence in a suit in equity by the purchaser against the owner for specific performance of the contract above described, where it appeared that there was no agreement for extension of the time within which the contract was to be performed and that the plaintiff did not tender performance on the day named and that on September 30 the plaintiff tendered performance, which the defendant refused, upon which it was held that findings in substance that time was not regarded by the parties as of the essence of the contract and that the plaintiff's tender was made within a reasonable time were warranted and that it would have been inequitable to have refused relief to the plaintiff. *Ibid.*

Provisions in a contract for the sale of "thirty cars" of coal at a certain price per ton "at the mine," under which the seller is not required to make a shipment by water at a time when there is an embargo on shipment by railroad and cannot be held liable for damages resulting to the purchaser from his failing to do so. *Wellington Piano Case Co.* v. *Garfield & Proctor Coal Co.* 544.

Under the provisions of the contract and in the circumstances above described, the embargo on shipment by railroad excused the defendant from making a shipment while the embargo continued. *Ibid.*

In the action above described it was held that under the provisions of the contract no error of law was shown in a finding and ruling that a "fair proportion" did not mean fifty per cent of the entire amount to be supplied under the contract, and that the five cars which the purchaser was

ready and willing to receive was a "fair proportion" of the contract requirements. *Wellington Piano Case Co.* v. *Garfield & Proctor Coal Co.* 544.

Performance and Breach.

Where, at the trial of an action upon a recognizance entered into by a judgment debtor arrested on an execution issued to enforce a judgment in an action of tort, the plaintiff introduced evidence of the judgment, the execution, the return of the officer making the arrest and the certificate of a master in chancery before whom the recognizance was entered into, and rested and no further evidence was admitted, a verdict for the defendants should have been ordered upon their motion, no breach of the recognizance being shown. *Brazill* v. *Green*, 93.

In an action by a salesman against his employer for breach of an agreement of employment it was held that a previous action brought by the salesman to recover instalments of wages due under the agreement did not constitute a waiver of his right to recover entire damages for the breach. *Dalton* v. *American Ammonia Co.* 105.

By R. L. c. 42, § 29, the filing, by a teacher in a public school in a city with the auditor or treasurer of the city or with any officer who may be prescribed in its charter, of one copy of a certificate from the school committee of his qualifications is made a condition precedent to his right to demand and receive compensation for his services; and this requirement of the statute cannot be waived either by the mayor or by the city solicitor in an action by the teacher against the city for balance of salary which had been withheld upon an order of the mayor for a reason other than a failure to file the certificate. *Averell* v. *Newburyport*, 208.

Where, before the time fixed for the performance of a contract for the sale and conveyance of land and buildings and without fault of either party to the contract, a substantial part of the real estate is destroyed, the seller, if at the time fixed for performance he has not restored the premises to substantially the condition in which they were when the contract was made, cannot maintain a suit in equity to compel specific performance of the contract, and the purchaser may maintain a suit to have the contract declared terminated and to compel the repayment to him of an amount advanced by him toward the purchase price. *Libman* v. *Levenson*, 221.

One, who in June, 1917, delivered $426 to another in consideration of his agreement to transmit it to a bank in Russia and to procure therewith a bank book for two thousand rubles, which book was to be delivered to the depositor of the money upon his paying therefor $56 more, may maintain against the person who thus received the money, upon an unjustifiable failure on his part to perform any part of the agreement, an action of contract for money had and received to recover the $426 so paid with interest, his remedy not being restricted to an action for breach of the agreement nor his damages limited to the value of two thousand rubles at the time when the bank book should have been delivered to the depositor. *Cohen* v. *Wintman*, 471.

Provisions in a contract for the sale of "thirty cars" of coal at a certain price per ton "at the mine" under which the seller is not required to make a shipment by water at a time when there is an embargo on shipment by railroad

and cannot be held liable for damages resulting to the purchaser from his failing to do so. *Wellington Piano Case Co.* v. *Garfield & Proctor Coal Co.* 544.

Under the provisions of the contract and in the circumstances above described, the embargo on shipment by railroad excused the defendant from making a shipment while the embargo continued. *Ibid.*

Rescission.

Where a salesman employed under a written contract for a year was discharged before the expiration of the year and brought an action against the employer to recover instalments of salary under the contract and thereafter brought a second action, alleging a wrongful discharge and claiming entire damages for breach of the contract it was held that the plaintiff in neither action elected to treat the contract as terminated. *Dalton* v. *American Ammonia Co.* 105.

Novation.

In an action of contract, where it appeared that the plaintiff who had been employed by the owner of certain property to find a purchaser of the property for him, and who had transmitted an offer to the defendant which was accepted, agreed to release the owner from his claim for services and commission in consideration of the defendant's promise to pay it, and that the defendant so agreed with the plaintiff, who released the owner, the owner stating that the arrangement was satisfactory to him, it was held that by the agreement of the three parties, a novation was effected by which the owner was discharged from liability to the plaintiff and the defendant by his promise was substituted as the plaintiff's debtor. *Curran* v. *O'Donnell*, 357.

In the action above described it was held that the contract was not subject to the provisions of the statute of frauds. *Ibid.*

In the action above described it was held that the plaintiff was entitled to recover. *Ibid.*

Termination.

Where, before the time fixed for the performance of a contract for the sale and conveyance of land and buildings and without fault of either party to the contract, a substantial part of the real estate is destroyed, the seller, if at the time fixed for performance he has not restored the premises to substantially the condition in which they were when the contract was made, cannot maintain a suit in equity to compel specific performance of the contract, and the purchaser may maintain a suit to have the contract declared terminated and to compel the repayment to him of an amount advanced by him toward the purchase price. *Libman* v. *Levenson*, 221.

In Writing.

In an action by the lessee against the lessor for damages resulting from a failure to supply heat, it was held that certain words stricken from a lease in writing before its execution could not be restored and could not be used in its construction. *Kennon* v. *Shepard*, 57.

In the above described action it also was held that the fair import of the words used was that, while the lessor promised to heat the premises he was to be under no liability in case he failed to do so. *Kennon* v. *Shepard*, 57.

In the above described action it also was held that no rule of law prevented the making of such an agreement. *Ibid.*

Implied.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate, that findings would have been warranted that the plaintiff was the efficient cause in inducing the purchase at the defendant's price, that the defendant's husband had told her of the employment of the plaintiff as a broker and that, knowing of the acts of her husband in her behalf and keeping silent, she had ratified and adopted his contract with the plaintiff. *Nielson, petitioner*, 1.

In an action by a railroad corporation against the consignee of certain cattle shipped under a contract containing a provision that the shipper was "at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported" for the value of two hundred pounds of hay per each carload, placed by the railroad corporation in each car in excess of one hundred pounds of hay, its former standard of feeding, to comply with a ruling of the department of agriculture without force of law and contrary to the demand of the shipper, it was held that the railroad corporation after the demand by the shipper had no authority from him to furnish feed beyond what was reasonably adequate for the special needs of the cattle. *New York Central Railroad* v. *Sturtevant & Haley Beef & Supply Co.* 16.

In the above described action it also was held that the railroad corporation did not have a right, superior to that of the shipper, to dictate what was a reasonable amount of feed to be given to the cattle while in transportation. *Ibid.*

In the above described action it also was held that one hundred pounds of hay per carload at the point of rest having been found to have been reasonable and adequate for the special needs of the cattle and the shipper having demanded that no more be furnished by the railroad corporation on his account, the consignee was not liable for any feed furnished beyond that amount after the shipper's demand. *Ibid.*

Provisions in a contract under which it was held that an action of contract for money had and received cannot be maintained against a municipal corporation for three per cent of an amount of money which, after it had become due to the plaintiff as the general contractor for the building of a school house, the defendant during the pendency of litigation begun by subcontractors under St. 1909, c. 514, § 23, had held on deposit in a bank account containing its general funds, receiving three per cent interest on the entire fund. *Goldman* v. *Worcester*, 319.

One, who in June, 1917, delivered $426 to another in consideration of his agreement to transmit it to a bank in Russia and to procure therewith a bank book for two thousand rubles, which book was to be delivered to the depositor of the money upon his paying therefor $56 more, may maintain against the

person who thus received the money, upon an unjustifiable failure on his part to perform any part of the agreement, an action of contract for money had and received to recover the $426 so paid with interest, his remedy not being restricted to an action for breach of the agreement nor his damages limited to the value of two thousand rubles at the time when the bank book should have been delivered to the depositor. *Cohen* v. *Wintman*, 471.

Of Apprenticeship.

Provisions in a contract in writing between a father, his minor son and the son's employer, a corporation, whereby the son became an apprentice to the employer for three years to learn the trade of a machinist, upon which in an action by the employer against the father for breach of the contract it was held that there was a consideration for the contract as between the employer and the father. *Putnam Machine Co.* v. *Mustakangas*, 376.

In the above described action it was held that although the contract was not a statutory indenture of apprenticeship nor made in accordance with the provisions of R. L. c. 155, it was valid and enforceable at common law by the employer against the father. *Ibid.*

In the above described action it was held that not being a statutory agreement of apprenticeship, the employer was not compelled by R. L. c. 155, § 11, to seek redress in the Probate Court, but might proceed at common law. *Ibid.*

In the above described action it was held that a provision in the contract for liquidated damages was valid. *Ibid.*

Of Indemnity.

Evidence in an action against a railroad corporation and a contractor, who had made an agreement to save the railroad corporation harmless from certain claims on account of injury, for injuries sustained by falling over a stake placed by the contractor and which the jury found was negligently left unprotected and unlighted, upon which it was held that the contractor, having been notified and given an opportunity to defend the action against the railroad corporation, was concluded as to all questions determined therein which were incident to a right of the railroad corporation to recover upon the agreement of indemnity. *Boston & Maine Railroad* v. *T. Stuart & Son Co.* 98.

In the action described above it was also held that the express language of the contract of indemnity did not require that it should be construed as one indemnifying the railroad corporation against the consequences of its own negligence; and the contract was valid. *Ibid.*

In the action above described it also was held that the contractor must respond in damages to the railroad corporation by reason of the contract to indemnify. *Ibid.*

Of Insurance.

Evidence in an action by an automobile dealer against an insurance agent for breach of an oral agreement to procure and deliver to the plaintiff a valid policy of insurance against fire upon certain automobiles upon which it was held that a verdict properly was ordered for the defendant. *Cass* v. *Lord*, 430.

An automobile dealer is bound by the provisions of a policy of insurance against loss by fire of his automobile, although he neither read the policy nor an accompanying rider nor knew "a single condition in" it, if he voluntarily accepted it and kept it in his safe until a loss by fire occurred. *Cass* v. *Lord*, 430.

In an action upon a policy of insurance against loss by fire issued to an automobile dealer and providing that it should "attach and cover upon automobiles, bodies, chassis, tops or other equipment while attached to and a part of automobiles owned by the assured and held by him for sale" it was held that the words, "automobiles owned by the assured and held by him for sale" were not ambiguous; and that evidence of negotiations and conversations preceding the issuing of the policy or following its issuance and before a fire within its terms, which tend to modify or vary its terms, were not admissible. *Ibid.*

A provision in the policy above described which it was held could not be overcome by invoking the aid of the doctrine of waiver and estoppel based on interviews of the assured with agents of the insurance company after he had received and had accepted the policy. *Ibid.*

Provisions in the rider attached to and made a part of the policy above described in evidence at the trial of an action upon the policy for the loss of nineteen automobiles of the plaintiff damaged by fire, where it appeared that, as to thirteen of the automobiles, the plaintiff had not reported to the company acquisition of ownership and possession "as soon as known" to him, and that such failure had not arisen from unavoidable mistake or excusable inadvertence on his part, upon which it was held that the plaintiff could not maintain the action. *Ibid.*

Wagering Contracts.

See that title.

CONVERSION.

Evidence in an action of contract or tort between two mining corporations not incorporated in this Commonwealth for the conversion of ore from veins, lodes and ledges which had their apexes within the plaintiff's surface boundaries in Arizona and for money had and received from its sale upon which it was held that the record presented a cause arising out of a *bona fide* dispute as to the title to real estate, where the primary question involved was the title. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185.

In the above described action it was held that the courts of this Commonwealth will not take jurisdiction of such an action, it being one local to the State of Arizona. *Ibid.*

At the trial of an action against a deputy sheriff for conversion of onions, testimony of the defendant, called by the plaintiff, that, as deputy sheriff, he had sold the onions six days after the attachment, was admissible. *Koski* v. *Haskins*, 346.

Evidence in the action above described of a demand for the onions made upon the deputy sheriff by the plaintiff's attorney which was held immaterial. *Ibid.*

In the action above described it was held that testimony of a warehouseman, in whose warehouse the onions, when attached, were stored was admissible, independently of entries in his books, if he kept any, that the plaintiff had made the arrangements with him for the storage of the onions. *Koski* v. *Haskins*, 346.

The measure of damages to be awarded to the plaintiff in the action above described was held to be the value of the onions at the time of the attachment. *Ibid.*

CORPORATION.

Officers and Agents.

A contract between a corporation and two of its officers for commissions to be paid in compensation for their services in connection with the sale of certain real estate which in an action for the commissions it was held was not invalid on its face. *Adams* v. *East Boston Co.* 121.

Evidence in the action above described upon which it was held that the contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom a proposed statute was to be presented, and therefore was unenforceable because contrary to public policy. *Ibid.*

In the above described action it also was held that it is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts, inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity. *Ibid.*

By R. L. c. 42, § 29, the filing, by a teacher in a public school in a city with the auditor or treasurer of the city or with any officer who may be prescribed in its charter, of one copy of a certificate from the school committee of his qualifications is made a condition precedent to his right to demand and receive compensation for his services; and this requirement of the statute cannot be waived either by the mayor or by the city solicitor in an action by the teacher against the city for balance of salary which had been withheld upon an order of the mayor for a reason other than a failure to file the certificate. *Averell* v. *Newburyport*, 208.

Municipal Corporations.

See that title.

COSTS.

See that subtitle under Equity Pleading and Practice.

CUSTOM.

Where at the trial of an action for personal injuries brought against a railroad corporation by a flagman in its employ the plaintiff testified that there was a practice that no train protected by a flagman should be backed until a signal came from the flagman, but the record showed no evidence tending

to prove that this method of transacting its business was known to the defendant or to its officers, nor any evidence from which it could be inferred that it was assented to by them, it was held that the defendant was not bound to observe a practice as to the moving of its trains adopted by its employees without its knowledge or acquiescence. *Howard* v. *New York, New Haven, & Hartford Railroad*, 370.

At the trial above described it was held that an instruction asked for by the defendant that on all the evidence the jury could not find that "there was a practice or custom that freight trains engaged in switching movements should not back without getting from the rear end flagman the signal so to do" should have been given. *Ibid.*

DAMAGES.

In Tort.

The measure of damages to be awarded to the plaintiff in an action against a deputy sheriff for an unlawful attachment of onions of the plaintiff upon a writ in an action against a third person is the value of the onions at the time of the attachment, although six days after the attachment and after the plaintiff had demanded the onions of him the defendant sold the onions as perishable property for a price greater than their value at the time of the attachment. *Koski* v. *Haskins*, 346.

Evidence at the trial of an action of tort for unlawful interference with the business of the proprietor of a barber shop by the business agent of a barber's union in distributing certain printed cards to passers-by in front of the shop upon which it was held that for the invasion of his rights the plaintiff was entitled to at least nominal damages. *Godin* v. *Niebuhr*, 350.

In the action above described it was held that there was evidence of specific damages. *Ibid.*

Evidence at the trial of the above described action upon which it was held that the jury might well have inferred that the intended and natural result of the defendant's wrongdoing was substantially to injure the plaintiff's business. *Ibid.*

Liquidated.

A provision for liquidated damages in a contract of apprenticeship which, in an action by the employer against the father of the apprentice for breach of the contract, it was held was valid. *Putnam Machine Co.* v. *Mustakangas*, 376.

Recoupment.

Instructions to the jury upon which it was held that a refusal of the judge to rule, at the trial above described, in substance that the plaintiff was entitled to recover, for such services as he rendered, only "what would be a reasonable and customary charge for similar services at the time and place in question," must be overruled. *Betts* v. *Rendle*, 441.

For Property taken or damaged under Statutory Authority.

A report, by a judge before whom was heard a petition for the assessment of damages, alleged to have been suffered by the proprietor of a general grain,

hay and feed business at wholesale and retail and incident to the construction by a city of a sewer upon which it was held that upon the record the petition must be considered as adequate for the giving of appropriate legal relief on the evidence, both because of the terms of the report and because the case had been fully tried. *F. F. Woodward Co.* v. *Fitchburg*, 364.

The provision as to damages in St. 1912, c. 440, empowering the city of Fitchburg to do the work, previously authorized by St. 1901, c. 354, of constructing, maintaining and operating main drains and common sewers, was intended to enlarge the provision contained in the earlier statute, and entitled a merchant to damages resulting from access to his premises being cut off by work in the construction of a trunk sewer in a public way adjacent thereto, although there was no taking of any of his property. *Ibid.*

A report in the above described action upon which it was held that it was not open to the respondent to contend that the petitioner was not entitled to recover at all because the damages were assessed on the basis of loss of business. *Ibid.*

Provisions in an agreement in the form of an indenture, executed and delivered in 1849, between the owner of the land bounded on the thread of a stream, across which there was a dam built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, upon which, in a petition for the assessment of damages resulting from a taking under statutory authority of the land and dam by a city for the purposes of its water supply it was held that there was incident to the land of the petitioner which was taken a right or interest under the contract which ought to be considered in estimating the fair market value of the land taken. *Battelle* v. *Worcester*, 395.

It also was held that damages assessed in connection with the contract should be limited to the value of the petitioner's right, which related to a release only to that part of the dam which rested upon the petitioner's land. *Ibid.*

Apportionment of Expense of Rebuilding Bridge over Railroad.

Upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, after their amendment by St. 1908, c. 542, a highway bridge in a town, which had been built over a railroad in accordance with a decree following proceedings under Pub. Sts. c. 112, §§ 131, 132, ordering that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair," may be ordered to be rebuilt and a part of the expense of such rebuilding may be assessed upon the railroad. *Selectmen of Brookline, petitioners*, 260.

A part of the expense of rebuilding a highway bridge over a railroad or of making any structural change or renewal for the purpose of strengthening or improving it upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, may be assessed upon the railroad corporation although it receives no benefit therefrom. *Ibid.*

Where, after a decree of county commissioners that a highway bridge over a railroad in a town should be rebuilt, the town carried the decree into effect "by agreement of all parties . . . and . . . paid the charges and expense of rebuilding" previous to a decree in proceedings instituted by it under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, the rail-

road company, at the trial of an application under § 27 of the amended statute for a jury to revise the report of the special commission appointed under the amended §§ 23, 25, is entitled to a ruling that it need not pay to the town interest upon that part of the amount so expended by the town which afterwards was apportioned to be paid by the railroad company. *Selectmen of Brookline, petitioners*, 260.

In Suit in Equity.

See subtitle under EQUITY JURISDICTION.

DEATH.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death.*

DECEIT.

A request for a ruling at the trial of an action for deceit, where it appears that false representations, which were relied on by the plaintiff as the foundation of the action, were not made by the defendant but were made by his agent acting within the scope of his authority which it is not error to refuse. *Howe* v. *Johnson*, 379.

Provisions in a decision, plan and decree of a commission for the abolition of a grade crossing in evidence in an action of deceit brought by a grantee of certain land against the grantor for an alleged false representation that the land was free from incumbrance, from which it was held that it could not be implied that the original location of the railroad, which included the northerly portion of the land, was discontinued. *Ibid.*

DEED.

Construction.

A provision in a deed granting a right of way over Boylston Place in Boston under which, upon a petition by the owners of Boylston Place for an amendment of a certificate of registration of title, it was held that, the dwelling houses having been destroyed, the right of way was extinguished. *Nash* v. *Eliot Street Garage Co.* 176.

Upon the same petition it also was held that the provision above referred to could not reasonably be construed as a temporary provision in regard to fencing lots which for a short period might be vacant before the houses were built. *Ibid.*

A grammatical construction of a clause in a deed will not control the manifest intention of the parties as expressed in the whole instrument if that intention is consistent with the rules of law. *Ibid.*

Provisions in a deed in evidence at the hearing of a petition for the registration of the title to a parcel of land, where it appeared that the respondent owned land adjoining that of the petitioner, and that the petitioner claimed a right of way over the respondent's land upon which it was held that the petitioner had no right of way over the land of the respondent. *McDonough* v. *Neighborhood Club of Swampscott, Inc.* 238.

Provisions in an agreement in the form of an indenture, executed and delivered

in 1849, between the owner of land bounded on the thread of a stream, across which there was a dam built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, upon which, in a petition for the assessment of damages resulting from a taking under statutory authority of the land and dam by a city for the purposes of its water supply it was held that the contract was not in violation of the rule against restraints on alienation or the rule against perpetuities. *Battelle* v. *Worcester*, 395.

In the above described proceedings it was held that the agreement was not a personal contract between the parties. *Ibid.*

In the above described proceedings it was held that the rights of the petitioner had not been lost by laches, but still was vested in him at the time of the taking. *Ibid.*

In the above described case it was held that the covenant relating to the release of the right to maintain the dam upon a payment of $800 by the owner of the land related only to that part of the dam built upon the petitioner's land and not to the part built upon land on the other side of the thread of the stream. *Ibid.*

Implied Grant of Right of Way.

Where a large tract of land is plotted into numerous lots bounded on many different ways, and deeds of the several lots contain no express grant of rights in the ways shown on the plan, a grant by implication of an onerous servitude in the nature of rights in the ways will not be presumed where such rights are not necessary for the enjoyment of the land conveyed, unless such grant clearly is shown to be intended by the parties to the deed. *Prentiss* v. *Gloucester*, 36.

A reference in a deed to a plan showing ways as above described, although accompanied by its use for description of bounds, will not convey to the grantee rights in the ways not necessary for the enjoyment of the premises where no intent to make such a grant appears in the deed. *Ibid.*

The necessity, in contemplation in ordinary cases, for the use of ways such as those above described, is that of access to public ways. *Ibid.*

The great desirability of a way for purposes of prospect does not make the use of a way, such as is above described, necessary to the granted premises. *Ibid.*

No grant by implication of a right of way over Eastern Point Boulevard (East), above described, arose from deeds of lots on Eastern Point Boulevard (West) and in the northeastern portion of the Point, Eastern Point Boulevard (East) not being mentioned in the deeds nor shown on plans accompanying them and its use not being necessary for access from the granted premises to a public way. *Ibid.*

Where at the hearing of the petition above described, it appeared that the common grantor of the petitioner and of the respondents filed in the registry of deeds an index map, representing Eastern Point as divided into sections, designated by letters, and this map showed Eastern Point Boulevard (East) as crossing the land later acquired by the petitioner and the respondents' deeds were accompanied by plans and contained reference to single sections of the index plan not juxtaposed to the petitioner's land and showing no part of it it was held that the index plan did not create nor enlarge

easements described in the deeds to the respondents, since it was not referred to therein for that purpose. *Prentiss* v. *Gloucester*, 36.

Where a deed of land contains a provision specifically defining rights of way which are appurtenant to the land conveyed, no easement in other ways on land of the grantor can be created by implication. *Ibid.*

Plan.

Where a large tract of land is plotted into numerous lots bounded on many different ways, the deeds of the several lots contain no express grant of rights in the ways shown on the plan, a grant by implication of an onerous servitude in the nature of rights in the ways will not be presumed where such rights are not necessary for the enjoyment of the land conveyed, unless such grant clearly is shown to be intended by the parties to the deed. *Prentiss* v. *Gloucester*, 36.

A reference in a deed to a plan showing ways as above described, although accompanied by its use for description of bounds, will not convey to the grantee rights in the ways not necessary for the enjoyment of the premises where no intent to make such a grant appears in the deed. *Ibid.*

Where at the hearing of the petition above described, it appeared that the common grantor of the petitioner and of the respondents filed in the registry of deeds an index map, representing Eastern Point as divided into sections, designated by letters, and this map showed Eastern Point Boulevard (East) as crossing the land later acquired by the petitioner and the respondents' deeds were accompanied by plans and contained reference to single sections of the index plan not juxtaposed to the petitioner's land and showing no part of it it was held, that the fact, that the detailed plan of the separate sections related to one large tract and might be fitted together, did not make them one plan in legal effect. *Ibid.*

Upon the same petition it also was held that the index plan did not create nor enlarge easements described in the deeds to the respondents, since it was not referred to therein for that purpose. *Ibid.*

Reformation.

Evidence upon which it was held that where the owner of certain real estate orally agreed to sell it for a certain price and upon the payment of the price conveyed to the purchaser only about one half of what both parties intended should be conveyed, the purchaser could not maintain a suit in equity against him for reformation of the deed so that it would include the land omitted by mutual mistake. Following Glass *v.* Hulbert, 102 Mass. 24. *Tracy* v. *Blinn*, 585.

Revenue Stamp.

In a suit in equity for the cancellation of a deed and a reconveyance of certain real estate where it appeared that the deed bore stamps required for a consideration of $3,000 instead of for $6,000, the consideration claimed, it was held that the paying for and cancelling of revenue stamps denoting a consideration price of $3,000 under the circumstances did not preclude the plaintiff from relief. *Neel* v. *Lang*, 61.

DEPARTMENT OF PUBLIC SAFETY.

A warrant, issued by the Governor of this Commonwealth on a demand by the Governor of the State of Illinois for the extradition of one indicted by the grand jury of that State, and directed to "Sheriffs, Deputy Sheriffs, Division of State Police Department of Public Safety, and other officers of and in the several cities and counties of this Commonwealth," cannot lawfully be served by an officer of the division of State police, department of public safety, he not being an officer designated in the warrant and the "division" not being an officer or a class of officers. *Graves's Case*, 493.

DEVISE AND LEGACY.

Construction.

While, if a will in its entirety produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication and so mould the language of the testator as to carry into effect as far as possible the intention sufficiently declared by the whole will, the intent which calls for the application of such a rule must be one appearing from the provision of the will and cannot be one founded on a contention based merely upon silence, conjecture or the relationship of the parties. *Bailey* v. *Bailey*, 244.

Provisions in a will of a widower having three sons, the first of whom had married against his wishes and was childless and under a conservatorship establishing a trust fund, upon which in a bill in equity for instructions, filed by the trustee after the death of that son's widow, it was held that there was nothing in the will that made certain what the testator intended should be done with one half of the trust fund upon the death of the widow of the son under conservatorship following the son's death leaving surviving him both the widow and a child. *Ibid.*

In the above described suit it was held that such an intent could not be supplied. *Ibid.*

In the suit above described it was held that the one half of the fund in question must be disposed of under the will as residuary estate. *Ibid.*

Whether Absolute or Life Estate.

Provisions in a will under which it was held that the testator's widow received an absolute estate in the real and the personal property. *Knibbs* v. *Knibbs*, 182.

Provisions in the will above described as to persons other than the intestate's widow which it was held were to be interpreted as expressive of a desire and request which did not affect the absolute estate given to the widow. *Ibid.*

Under the provisions of the will above described it was held that the persons other than the widow had no right under the will enforceable either at law or in equity. *Ibid.*

Acceleration of Remainder by Waiver of Life Estate by Widow.

Upon an agreed statement of facts in a suit in equity by an executrix to determine to whom should be paid two thirds of the income from a certain parcel of real estate which the testator devised to his widow for life and on her death to his son where the widow waived the provisions of the will in her favor under R. L. c. 135, § 16, and the income in question was claimed both by the son and by the testator's daughters, who were specific and residuary devisees under his will, it was held that the waiver by the widow of her life estate in the property in question accelerated the estate in remainder given to the son, and, no intention to the contrary appearing in the will, the loss occasioned thereby must fall upon the residuary legatees. *Hesseltine* v. *Partridge*, 77.

In the above described suit it was held that no adjustment of losses as between the specific devisees could be made upon the facts agreed upon. *Ibid.*

In the above described suit it also was held that the executrix should pay the remaining two thirds of the income from the first parcel to the son of the testator. *Ibid.*

Time of Vesting.

Provisions in a trust created by will under which it was held that the interest in the trust property in remainder after the life interests vested at the death of the testator. *Trull* v. *Tarbell*, 68.

"Heirs at Law."

Provisions in a trust created by will under which it was held that in the events which happened the interest in the trust property in remainder after the life interests vested in those who were the testator's "heirs at law" at the time of his death, descended to the survivor of his children and was subject to the provisions of that child's will. *Trull* v. *Tarbell*, 68.

Residue Clause.

Upon an agreed statement of facts in a suit in equity by an executrix to determine to whom should be paid two thirds of the income from a certain parcel of real estate which the testator devised to his widow for life and on her death to his son where the widow waived the provisions of the will in her favor under R. L. c. 135, § 16, and the income in question was claimed both by the son and by the testator's daughters, who were specific and residuary devisees under his will, it was held that the waiver by the widow of her life estate in the property in question accelerated the estate in remainder given to the son, and, no intention to the contrary appearing in the will, the loss occasioned thereby must fall upon the residuary legatees. *Hesseltine* v. *Partridge*, 77.

Rule against Perpetuities.

See PERPETUITIES, RULE AGAINST.

DIRECTOR GENERAL OF RAILROADS.

Where a suit in equity, brought by a railroad corporation and by the Director General of Railroads in 1918, was dismissed by a final decree on January 26, 1920, "with costs to the defendants," this court took judicial notice of the fact that at the time of the entry of the decree the Director General of Railroads no longer was operating the railroad, and ordered that the decree be so modified as to provide that he be not required to pay costs. *New York Central Railroad* v. *Stoneman*, 81.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICIL.

A man with a domicil in the State of Rhode Island, who comes to a city in Massachusetts, does not lose his domicil in Rhode Island and acquire one in Massachusetts until he has a definite and fixed intention to remain in and to become a resident of this Commonwealth. *Field* v. *Field*, 256.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life. *Ibid.*

Evidence in a libel for divorce upon which it was held that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4. *Ibid.*

DRAIN.

A suit in equity cannot be maintained to enjoin a city from draining water by a twelve inch pipe from a public way and through an artificial open ditch across land of a third person and land of the plaintiff to a six inch pipe under a private way which discharged beyond the plaintiff's land, although the result of such method of draining is to cause water to overflow upon the plaintiff's land, where the ditch was dug many years after the twelve inch pipe was laid and it does not appear that the city caused it to be dug or the six inch pipe to be laid or ever maintained or recognized either as a means of drainage or otherwise. *Blair* v. *Brockton*, 512.

DURESS.

Where at the hearing of a libel for annulment of a marriage on the ground that it was procured by duress and false imprisonment of the libellant while he was under arrest charged with getting the libellee with child the libellant at the close of the evidence asked for a ruling that the marriage be annulled on the ground that he was falsely imprisoned at the moment of marriage, the ruling was refused and the libel was ordered dismissed subject to exceptions by the libellant, it was held that the exceptions must

be considered on the basis that the issuable facts were found against the libellant, and that therefore they must be overruled. *Day* v. *Day*, 362.

EASEMENT.

Upon exceptions, by certain respondents in a petition in the Land Court for the registration of the title to a certain parcel of land on Eastern Point in Gloucester, to rulings that the respondents were not entitled to a right of way over the petitioner's land, it was held that there was no necessity for considering what right of way, if any, owners of land on the Point, other than the excepting respondents, might have, except so far as the existence of such rights might be pertinent to the exceptions. *Prentiss* v. *Gloucester*, 36.

Upon the above described petition it was held that an order for registration for the petitioner, excluding any right of way for the respondents imported a finding of all subsidiary facts essential to support it. *Ibid.*

Where a large tract of land is plotted into numerous lots bounded on many different ways, the deeds of the several lots contain no express grant of rights in the ways shown on the plan, a grant by implication of an onerous servitude in the nature of rights in the ways will not be presumed where such rights are not necessary for the enjoyment of the land conveyed, unless such grant clearly is shown to be intended by the parties to the deed. *Ibid.*

A reference in a deed to a plan showing ways as above described, although accompanied by its use for description of bounds, will not convey to the grantee rights in the ways not necessary for the enjoyment of the premises where no intent to make such a grant appears in the deed. *Ibid.*

The necessity, in contemplation in ordinary cases, for the use of ways such as those above described, is that of access to public ways. *Ibid.*

The great desirability of a way for purposes of prospect does not make the use of a way, such as is above described, necessary to the granted premises. *Ibid.*

No grant by implication of a right of way over Eastern Point Boulevard (East), above described, arose from deeds of lots on Eastern Point Boulevard (West) and in the northeastern portion of the Point, Eastern Point Boulevard (East) not being mentioned in the deeds nor shown on plans accompanying them and its use not being necessary for access from the granted premises to a public way. *Ibid.*

Where at the hearing of the petition above described, it appeared that the common grantor of the petitioner and of the respondents filed in the registry of deeds an index map, representing Eastern Point as divided into sections, designated by letters, and this map showed Eastern Point Boulevard (East) as crossing the land later acquired by the petitioner and the respondents' deeds were accompanied by plans and contained reference to single sections of the index plan not juxtaposed to the petitioner's land and showing no part of it it was held that the index plan did not create nor enlarge easements described in the deeds to the respondents, since it was not referred to therein for that purpose. *Ibid.*

Where a deed of land contains a provision specifically defining rights of way which are appurtenant to the land conveyed no easement in other ways on land of the grantor can be created by implication. *Ibid.*

Evidence at the hearing of the petition above described, upon which it was held that a ruling that the city had no easement or other rights in the road in question over the petitioner's land was wrong and that the exception by the city to the ruling must be sustained. *Prentiss* v. *Gloucester*, 36.

In making the decision, above stated, as to the rights of the city of Gloucester in the land of the petitioner, it further was stated, that the effect of the easement given to the city as to ways which might thereafter "be laid out or constructed" by the grantors and their successors was not determined. *Ibid.*

A provision in a deed granting a right of way over Boylston Place in Boston which, upon a petition by the owners of Boylston Place for an amendment of a certificate of registration of title, it was held expressly and intentionally limited the right of way to the occupants of certain dwelling houses to be erected. *Nash* v. *Eliot Street Garage Co.* 176.

Upon the petition above described it was held that, the dwelling houses having been destroyed, the right of way was extinguished. *Ibid.*

Upon the same petition it also was held that the provision above referred to could not reasonably be construed as a temporary provision in regard to fencing lots which for a short period might be vacant before the houses were built. *Ibid.*

ELECTION.

Where a salesman who was employed under a written contract for a year for a stipulated salary per week and further compensation at the end of the year and was discharged before the year expired brought an action against the employer upon an account annexed containing an item for salary for the week ending at the time of the termination of the employment, and a second and a third item, respectively, for salary for two weeks following the date of the writ, and obtained a judgment for the first item, and thereafter the plaintiff brought a second action, alleging a wrongful discharge and claiming entire damages for breach of the contract it was held that the plaintiff in neither action elected to treat the contract as terminated. *Dalton* v. *American Ammonia Co.* 105.

The two actions above described were held not inconsistent. *Ibid.*

The two items in the first action above described, wherein the plaintiff claimed salary for two weeks succeeding his alleged discharge, it was held did not constitute a decisive election inconsistent with the second action. *Ibid.*

Where the trial of an action, founded upon contentions by the plaintiff that the defendant wrongfully occupied premises owned by the plaintiff knowing that by so doing he was preventing the plaintiff from making a lease of them, proceeded, by reason of statements by the plaintiff's counsel and statements by the trial judge assented to or treated with silence and without objection by the plaintiff's counsel, as upon a claim for damages resulting from a malicious interference with the contract of letting about to be executed, and a verdict was ordered for the defendant, it is not open to the plaintiff, upon an exception to the ordering of the verdict, to contend in this court that he was entitled to go to the jury on a claim for trespass. *Goldsmith* v. *Traveler Shoe Co.* 111.

Evidence in a suit in equity, begun in May, 1907, to have a foreclosure of a

second mortgage upon real estate of the plaintiff declared invalid, the plaintiff given a right to redeem, and "that the plaintiff may be awarded damages . . . for the injuries done her by the defendant," upon which it was held that the plaintiff had elected to waive damages and rely on her right to redemption. *O'Brien* v. *Logan*, 507.

In the suit above described it was held that the foreclosure of the first mortgage did not give the plaintiff a right to abandon the remedy which she previously had elected to pursue and to have relief by damages. *Ibid.*

Election between counts of a declaration, see appropriate subtitle under PRACTICE, CIVIL.

EMINENT DOMAIN.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE; see also WORKMEN'S COMPENSATION ACT.

Actions for injuries which were received by employees within the provisions of the federal employers' liability act, see appropriate subtitle under NEGLIGENCE, *Employer's Liability.*

EQUITY JURISDICTION.

He who seeks Equity must do Equity.

In the above described suit it was held that the defendant was entitled to have the suit dismissed with costs since equity will not afford its shield against the natural consequences of contumaciously wrongful conduct. *Finkovitch* v. *Cline*, 196.

Accounting.

The allegations of a bill in equity by an attorney at law against two other attorneys and a third defendant for an accounting and to reach and apply assets not attachable at law upon which it was held that the bill was founded upon distinct and separate causes of action which had no connection with each other, and was multifarious; and that demurrers thereto on that ground should be sustained. *Reno* v. *Cotter*, 556.

Evidence at the hearing by a master of a suit in equity for a partnership accounting, upon which it was held that the master properly might refuse to hold the defendant responsible for neglect to keep proper books of account which would show in what way were disbursed daily receipts received by the defendant during the period when the plaintiff was not present to take care of his own interests. *Poulette* v. *Chainay*, 602.

Contempt.

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the

suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional. *Walton Lunch Co.* v. *Kearney*, 310.

Master.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff was entitled to, was held to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

A motion to reopen hearings to permit the introduction of alleged newly discovered evidence in a suit to restrain unfair competition which it was held was in the discretion of the master to deny. *Ibid.*

Mistake.

Evidence in a suit in equity by the grantor of certain real estate for the cancellation of her deed and for a reconveyance of the property where it appeared that the grantor had authorized her sister to offer the property to a neighbor for $6,000, which the sister did and understood the offer was accepted, and the neighbor's attorney affixed stamps to the deed required by a purchase price of $3,000 which the sister paid for and cancelled and later the grantee believed the price to be $3,000 refused to pay $6,000, and refused to reconvey the property upon which it was held that there was no meeting of minds and no completed contract and that the plaintiff was entitled to relief. *Neel* v. *Lang*, 61.

In the above described suit it was held that there was no negligence of the plaintiff or of her sister to justify the defendant in supposing that the plaintiff assented to a sale for a consideration of $3,000. *Ibid.*

In the above described suit it was held that owing to the fact that neither the plaintiff nor her sister was responsible for the error of the defendant, the questions, whether the sister exceeded her authority in delivering the deed without payment of the consideration price, and whether and how far the plaintiff was bound by her act in so doing, were immaterial. *Ibid.*

In the above described suit it was held that the paying for and cancelling of revenue stamps denoting a consideration price of $3,000 under the circumstances did not preclude the plaintiff from relief. *Ibid.*

Evidence upon which it was held that where the owner of certain real estate orally agreed to sell it for a certain price and upon the payment of the price conveyed to the purchaser only about one half of what both parties intended should be conveyed, the purchaser could not maintain a suit in equity against him for reformation of the deed so that it would include the land omitted by mutual mistake. Following Glass *v.* Hulbert, 102 Mass. 24. *Tracy* v. *Blinn*, 585.

Retaining Bill for Assessment of Damages.

Evidence in a suit in equity, begun in May, 1907, to have a foreclosure of a second mortgage upon real estate of the plaintiff declared invalid, the plaintiff given a right to redeem, and "that the plaintiff may be awarded damages . . . for the injuries done her by the defendant," upon which it was held that the plaintiff was not entitled to a decree awarding her both redemption from the second mortgage and damages because of its wrongful foreclosure. *O'Brien* v. *Logan*, 507.

In the above described suit it was held that the plaintiff had elected to waive damages and rely on her right to redemption. *Ibid.*

In the above described suit it was held that the foreclosure of the first mortgage did not give the plaintiff a right to abandon the remedy which she previously had elected to pursue and to have relief by damages. *Ibid.*

Res judicata.

In a suit in equity in Massachusetts for the specific performance of a certain contract in writing made in 1892 or damages where it appeared that previously the defendant's predecessor in title had obtained a decree in a suit in equity in Vermont restraining the plaintiff's assignor from trespassing upon the land it was held that while the parties in the Massachusetts suit were not the same as those in the Vermont suit, they were their privies so far as concerned the contract of 1892. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

In the above described suit it was held that the causes of action upon which the two suits rested were different. *Ibid.*

In the above described suit it also was held that the judgment in the Vermont suit was conclusive only upon issues therein actually tried and determined. *Ibid.*

Specific Performance of Contract.

In a suit in equity in Massachusetts for the specific performance of a certain contract in writing made in 1892 or damages where it appeared that previously the defendant's predecessor in title had obtained a decree in a suit in equity in Vermont restraining the plaintiff's assignor from trespassing upon the land it was held that while the parties in the Massachusetts suit were not the same as those in the Vermont suit, they were their privies so far as concerned the contract of 1892. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

In the above described suit it was held that the causes of action upon which the two suits rested were different. *Ibid.*

In the above described suit it also was held that the judgment in the Vermont suit was conclusive only upon issues therein actually tried and determined. *Ibid.*

Where, before the time fixed for the performance of a contract for the sale and conveyance of land and buildings and without fault of either party to the contract, a substantial part of the real estate is destroyed, the seller, if at the time fixed for performance he has not restored the premises to substantially the condition in which they were when the contract was made,

cannot maintain a suit in equity to compel specific performance of the contract, and the purchaser may maintain a suit to have the contract declared terminated and to compel the repayment to him of an amount advanced by him toward the purchase price. *Libman* v. *Levenson*, 221.

Evidence in a suit in equity by the purchaser against the owner for specific performance of a contract for the purchase and sale of real estate on or before September 1, where it appeared that there was no agreement for extension of the time within which the contract was to be performed and that the plaintiff did not tender performance on the day named and that on September 30 the plaintiff tendered performance, which the defendant refused, upon which it was held that findings in substance that time was not regarded by the parties as of the essence of the contract and that the plaintiff's tender was made within a reasonable time were warranted and that it would have been inequitable to have refused relief to the plaintiff. *Morgan* v. *Forbes*, 480.

To invalidate Foreclosure Sale.

Evidence in a suit in equity by one of three sons of a woman who had died intestate seised of certain real estate, against the wife of the plaintiff's father by a second marriage and a bank to which his mother had mortgaged the real estate to secure the payment of a note of $3,500, to have a sale and conveyance of the property to the second wife of the father in foreclosure under a power of sale in the mortgage set aside as having been procured by fraud upon which it was held that it was a reasonable inference that the letters conveying to the plaintiff notice of the impending sale were received by him. *Porter* v. *Porter*, 422.

In the above described suit it was held that the findings of the master and reasonable inferences to be drawn therefrom did not warrant a finding of collusion and lack of good faith on the part of the defendants. *Ibid.*

In the above described suit it was held that the mere fact, that the property brought less than its value, did not invalidate the sale. *Ibid.*

To reach and apply Property not attachable at Law.

A bill in equity under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, cannot be maintained to reach and apply, in payment of a debt due to the plaintiff from the principal defendant, salary due to that defendant as first assistant assessor of taxes of the city of Boston, such salary being attachable by trustee process. *Hooker* v. *McLennan*, 117.

Where a creditor of a corporation named "D Trucking, Inc.," brought a bill in equity to reach and apply in payment of the debt property in the possession of a third person not attachable at law, and in the bill described the debtor as "D Trucking Co., Inc.," although he intended to describe "D Trucking, Inc.," and later a trustee process was served upon the third party as trustee in an action at law by another creditor against the same debtor, in which the debtor was correctly described, the plaintiff in the suit in equity was permitted to amend his bill so that it correctly described the debtor and a final decree was ordered directing that his claim be paid first

from the fund, the second creditor appealed and it was held that the amendment properly was allowed. *Connelly* v. *Dionne Trucking, Inc.* 460.

The allegations of a bill in equity by an attorney at law against two other attorneys and a third defendant for an accounting and to reach and apply assets not attachable at law upon which it was held that the bill was founded upon distinct and separate causes of action which had no connection with each other, and was multifarious; and that demurrers thereto on that ground should be sustained. *Reno* v. *Cotter*, 556.

To reform Deed.

Evidence upon which it was held that where the owner of certain real estate orally agreed to sell it for a certain price and upon the payment of the price conveyed to the purchaser only about one half of what both parties intended should be conveyed, the purchaser could not maintain a suit in equity against him for reformation of the deed so that it would include the land omitted by mutual mistake. Following Glass v. Hulbert, 102 Mass. 24. *Tracy* v. *Blinn*, 585.

To enjoin Ejectment of Tenant by Landlord.

Evidence upon which it was held that the lessee of a second floor apartment of a two-family dwelling house whose wife persistently hung clothes to dry on lines upon a piazza over the front entrance to the house could not maintain a suit in equity to restrain the lessor from ejecting him for breach of a covenant in the lease not to "make or suffer any unlawful, improper, noisy or otherwise offensive use" of the premises. *Finkovitch* v. *Cline*, 196.

In the above described suit it was held that the defendant was entitled to have the suit dismissed with costs since equity will not afford its shield against the natural consequences of contumaciously wrongful conduct. *Ibid.*

To enjoin Strike.

A strike of workmen which is for the sole object of compelling the employer to re-employ a discharged fellow workman of the strikers is a strike for an unlawful purpose, and it will be enjoined in a suit in equity by the employer against the strikers, even if no illegal means are employed to carry it into effect. *Mechanics Foundry & Machine Co.* v. *Lynch*, 504.

To enjoin Trespass.

A suit in equity cannot be maintained to enjoin a city from draining water by a twelve inch pipe from a public way and through an artificial open ditch across land of a third person and land of the plaintiff to a six inch pipe under a private way which discharged beyond the plaintiff's land, although the result of such method of draining is to cause water to overflow upon the plaintiff's land, where the ditch was dug many years after the twelve inch pipe was laid and it does not appear that the city caused it to be dug or the six inch pipe to be laid or ever maintained or recognized either as a means of drainage or otherwise. *Blair* v. *Brockton*, 512.

To enjoin Use of Trade Name.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff was entitled to, was held to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

Expert evidence to determine the cost of goods sold by the defendant in the unfair competition which was the subject of the suit above described was held to have been admissible where it appeared that the defendant did not furnish all the information within his control as to the cost of goods and profits made by him. *Ibid.*

The master in the suit above described was held properly to have ruled that losses sustained by the defendant in selling goods at less than cost should not be deducted from profits made in the sale of other goods. *Ibid.*

In the above described suit it was held that the defendant was not entitled as of right under the circumstances to prove sales made by him to customers which were his before he began the unfair competition, thereby to establish what he might have realized as profits if he had conducted his business without attempting to appropriate the benefit of the name of the plaintiff. *Ibid.*

A motion to reopen hearings to permit the introduction of alleged newly discovered evidence in a suit to restrain unfair competition which it was held was in the discretion of the master to deny. *Ibid.*

To enjoin Unlawful Interference.

See UNLAWFUL INTERFERENCE.

EQUITY PLEADING AND PRACTICE.

Bill.

The allegations of a bill in equity by an attorney at law against two other attorneys and a third defendant for an accounting and to reach and apply assets not attachable at law upon which it was held that the bill was founded upon distinct and separate causes of action which had no connection with each other, and was multifarious; and that demurrers thereto on that ground should be sustained. *Reno* v. *Cotter*, 556.

The disposition of a motion to amend a bill in equity rests in the sound judicial discretion of the court. *Ibid.*

The disposition of a motion of the plaintiff, in the suit above described, to strike out the client as a party defendant and to divide the bill, leaving in only allegations applicable to a joint claim against the two defendants who were attorneys at law, lies in the sound judicial discretion of the court. *Ibid.*

Supplemental Bill.

The proper office of a supplemental bill in equity is to support a ground of suit, existing when the original bill was filed, by facts occurring since the filing of the original bill and coming to the knowledge of the plaintiff subsequent thereto. *Reno* v. *Cotter*, 556.

Demurrer.

Whether, under modern equity pleading and practice, the earlier rule prevails that the filing of a general plea is a waiver of a general demurrer, was not determined in a suit where a plea was filed "by consent" and "without waiving . . . demurrer," and where the trial judge, stating that he was of opinion that an interlocutory decree should be entered adjudging the plea insufficient and overruling the demurrer, reported the case to this court for determination. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Plea.

Whether, under modern equity pleading and practice, the earlier rule prevails that the filing of a general plea is a waiver of a general demurrer, was not determined in a suit where a plea was filed "by consent" and "without waiving . . . demurrer," and where the trial judge, stating that he was of opinion that an interlocutory decree should be entered adjudging the plea insufficient and overruling the demurrer, reported the case to this court for determination. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Amendment.

Where a creditor of a corporation named "D Trucking, Inc.," brought a bill in equity to reach and apply in payment of the debt property in the possession of a third person not attachable at law, and in the bill described the debtor as "D Trucking Co., Inc.," although he intended to describe "D Trucking, Inc." and later a trustee process was served upon the third party as trustee in an action at law by another creditor against the same debtor, in which the debtor was correctly described, the plaintiff in the suit in equity was permitted to amend his bill so that it correctly described the debtor and a final decree was ordered directing that his claim be paid first from the fund, the second creditor appealed and it was held that the amendment properly was allowed, since it resulted in the correction of a mere clerical error or misnomer without creating an actual change of existing parties or introducing a new demand or cause of action. *Connelly* v. *Dionne Trucking, Inc.* 460.

The disposition of a motion to amend a bill in equity rests in the sound judicial discretion of the court. *Reno* v. *Cotter*, 556.

The disposition of a motion of the plaintiff, in a suit in equity by an attorney at law against two other attorneys and a third defendant to strike out the client as a party defendant and to divide the bill, leaving in only allegations applicable to a joint claim against the two defendants who were attorneys at law, lies in the sound judicial discretion of the court. *Ibid.*

Master.

An exception to a refusal of a master to make a certain finding of fact must be overruled where the evidence before the master is not reported. *Poulette* v. *Chainay*, 602.

Exceptions.

Upon exceptions to rulings of a judge who heard a suit in equity upon the pleadings and a report of a master without a report of the evidence, findings of fact cannot be reviewed. *Porter* v. *Porter*, 422.

Findings by Judge.

Upon exceptions to rulings of a judge who heard a suit in equity upon the pleadings and a report of a master without a report of the evidence, findings of fact cannot be reviewed. *Porter* v. *Porter*, 422.

Report.

Where, after having attempted to report a suit in equity upon the bill and a demurrer without making any ruling as to the demurrer, a judge of the Superior Court files a second report in which he states that he "made an order sustaining" the demurrer and reports that ruling to this court for determination, the second report must be taken to have revoked and superseded the first, although it did not expressly so state. *Reno* v. *Cotter*, 556.

The failure of the plaintiff in a suit in equity for a year and one half to enter in this court a report by a judge of the Superior Court of a ruling sustaining a demurrer to the bill is abundant reason for allowing a motion by the defendant that the report be discharged. *Ibid.*

Where a judge of the Superior Court who heard a demurrer to a bill in equity filed a report to this court in which he stated that he sustained the demurrer, but no formal decree to that effect was entered and a motion by the defendant that the report be discharged for failure of the plaintiff to enter it in this court was allowed a year and a half later and subsequently a motion by the defendant for the entry of a formal decree sustaining the demurrer on the ground that the matter already had been decided by the first judge was allowed by a second judge as of the date of the filing of the report by the first judge, upon an appeal from such decree, where the record did not include a report of evidence, it was held that it was not essential that the motion be decided by the same judge who filed the report. *Ibid.*

In the suit above described it was held that although the report was discharged, it was proper to resort to it for any rightful purpose. *Ibid.*

Where a judge of the Superior Court files a report in a suit in equity reciting that he had made an order sustaining a demurrer to the bill, but it appears that he had not formally entered such an order, and later, by order of another judge, an interlocutory decree sustaining the demurrer is entered as of the date of the filing of the report by the first judge, a motion of the plaintiff that the report be discharged on the ground that there was no ground for the report because when it was filed the judge had not made an order sustaining the demurrer, properly may be denied. *Ibid.*

Decree.

Where a suit in equity, brought by a railroad corporation and by the Director General of Railroads in 1918, was dismissed by a final decree on January 26, 1920, "with costs to the defendants," this court took judicial notice of the

fact that at the time of the entry of the decree the Director General of Railroads no longer was operating the railroad, and ordered that the decree be so modified as to provide that he be not required to pay the costs. *New York Central Railroad* v. *Stoneman*, 81.

It seems, that a decision in writing, signed by a judge of the Superior Court, stating that he allowed a motion of the defendant in a suit in equity that a report to this court by another judge of a ruling sustaining a demurrer to the bill be discharged, may be treated as an interlocutory decree. *Reno* v. *Cotter*, 556.

Where a judge of the Superior Court who heard a demurrer to a bill in equity filed a report to this court in which he stated that he sustained the demurrer, but no formal decree to that effect was entered and a motion by the defendant that the report be discharged for failure of the plaintiff to enter it in this court was allowed a year and a half later and subsequently a motion by the defendant for the entry of a formal decree sustaining the demurrer on the ground that the matter already had been decided by the first judge was allowed by the second judge as of the date of the filing of the report by the first judge, upon an appeal from such decree, where the record did not include a report of evidence, it was held that the statement in the report by the first judge that he had made an order sustaining the demurrer was a sufficient foundation for the subsequent entry, *nunc pro tunc*, upon the order of the second judge, of an interlocutory decree to that effect. *Ibid.*

In the above described suit it also was held that so far as the decree included a recital of facts, it must stand, no evidence being reported. *Ibid.*

In the above described suit it was held that so far as the decree included a ruling of law, it was within the jurisdiction and power of the court and was warranted. *Ibid.*

Appeal.

While it is the duty of this court, on an appeal from a final decree in a suit in equity with a report of all the evidence, to examine the evidence with care and to reach its own conclusion as to the facts, a finding by the trial judge after a hearing in which witnesses have been heard to testify in person will not be reversed unless plainly wrong. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

A denial of a motion to recommit a report to a master is within the discretion of the trial judge and is not subject to review upon an appeal from a final decree which included such denial. *Ibid.*

No appeal lies from an interlocutory order for a decree. *Steele* v. *Estabrook*, 252.

Upon an appeal, without a report of evidence, from an order by a judge of the Superior Court, which denied a motion of the plaintiff in a suit in equity to discharge a report to this court, filed more than one and one half years before by another judge, of a ruling sustaining a demurrer to the original bill and also denied a motion by the plaintiff to amend his bill and allowed motions of the defendant to discharge the report and that judgment be entered for the defendant, the order, so far as it involves a finding of fact, must stand. *Reno* v. *Cotter*, 556.

Upon an appeal in a suit in equity from a final decree which, besides dismissing the bill, included several matters which already had been the subject of

interlocutory orders and decrees, the correctness of the disposition made of such interlocutory matters is open for consideration. *Reno* v. *Cotter*, 556.

Costs.

Where a suit in equity, brought by a railroad corporation and by the Director General of Railroads in 1918, was dismissed by a final decree on January 26, 1920, "with costs to the defendants," this court took judicial notice of the fact that at the time of the entry of the decree the Director General of Railroads no longer was operating the railroad, and ordered that the decree be so modified as to provide that he be not required to pay the costs. *New York Central Railroad* v. *Stoneman*, 81.

ERROR, WRIT OF.

See WRIT OF ERROR.

ESTOPPEL.

Circumstances under which the mere production, by a railroad corporation at a hearing before a commission for the abolition of a grade crossing of a plan which did not show the easement of the original location, could not be ruled as matter of law, at the trial of an action of deceit brought by a grantee of certain land against the grantor for an alleged false representation that the land was free from incumbrance to create an estoppel of the railroad corporation from claiming the existence of such easement. *Howe* v. *Johnson*, 379.

A provision in a policy of insurance against fire which it was held could not be overcome by invoking the aid of the doctrine of waiver and estoppel based on interviews of the assured with agents of the insurance company after he had received and had accepted the policy. *Cass* v. *Lord*, 430.

EVIDENCE.

Presumptions and Burden of Proof.

In an action upon a promissory note by the payee against the maker the burden of establishing a defence of partial failure of consideration, if properly pleaded, is upon the defendant. *Indiana Flooring Co.* v. *Rudnick*, 90.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care exercised by his parents, by the provisions of St. 1914, c. 553. *Ibid.*

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his

parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances. *Sullivan* v. *Chadwick*, 130.

Where, in an action of tort for personal injuries, upon a view of the evidence most favorable to the plaintiff, a finding must be made that the plaintiff was negligent, the plaintiff is not aided by the provisions of St. 1914, c. 553, and a verdict should be ordered for the defendant. *Ibid.*

Where an action is heard upon an auditor's report, and upon other evidence which does not contradict nor affect the findings of the auditor, the report is *prima facie* evidence and requires a judgment in accordance with its findings of fact unless, upon all the facts found, both primary and subsidiary, the report is reasonably susceptible of more than one inference. *Barrell* v. *Paine*, 157.

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate, of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated. *Coghlan* v. *White*, 165.

It is a matter of common knowledge that under present conditions a coal burning locomotive cannot draw a train without emitting cinders and smoke. *Shine* v. *New York, New Haven, & Hartford Railroad*, 419.

Evidence upon which it was held that it was proper, at the trial of an action of contract for services and disbursements made in raising a sunken lighter wherein the defendant claimed in recoupment damages alleged to have resulted from negligence of the plaintiff for the judge to refuse a request by the defendant that he rule, "To make out a case of specific negligence on the part of the plaintiff it was not necessary for the defendant to put his hand on the specific act of the plaintiff that caused the damage to his lighter. It was enough for the defendant to prove that the damage must have been caused by one or more of several things." *Betts* v. *Rendle*, 441.

In a suit in equity to have a sale and conveyance of certain property under foreclosure of a mortgage set aside as having been procured by fraud it was held that the mere fact that the property brought less than its value, did not invalidate the sale. *Porter* v. *Porter*, 422.

There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction. *Robinson* v. *Freeman*, 446.

Evidence at the trial of an action upon a judgment of a court of the State of New York of general jurisdiction upon which it was held that the presumption in favor of the judgment of the New York court was not overcome as a matter of law and the recitals of the record of the judgment as to service upon the defendant were properly considered. *Ibid.*

A finding of an auditor, to whom was referred an action under R. L. c. 99, § 4, for cash paid and securities delivered by the plaintiff to the defendant, a stockbroker "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold" it was held was, under § 6 of the statute, at most *prima facie* evidence of the apparent intent required by the statute, and did not as

a matter of law require a finding of such intent if on all the evidence a contrary finding was warranted. *Adams* v. *Hayden*, 454.

Evidence upon a claim for compensation under the workmen's compensation act by the dependent mother of one who met his death while employed as a "bus boy" in a restaurant by falling down the shaft of an elevator which it was no part of his work to operate and which he had been instructed not to use and not to go near upon which it was held that all the facts and circumstances shown and every reasonable inference therefrom left conjectural what the employee was doing when he fell into the well and what was the exact cause of his death; and that the claimant therefore had not established her claim. *McMahon's Case*, 473.

A warrant issued by the Governor of this Commonwealth under St. 1920, c. 399, upon a demand by a Governor of a sister State made under R. L. c. 217, § 11, for the arrest and rendition of a fugitive from justice under indictment in that State, is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled. *Graves's Case*, 493.

Judicial Notice.

Where a suit in equity, brought by a railroad corporation and by the Director General of Railroads in 1918, was dismissed by a final decree on January 26, 1920, "with costs to the defendants," this court took judicial notice of the fact that at the time of the entry of the decree the Director General of Railroads no longer was operating the railroad, and ordered that the decree be so modified as to provide that he be not required to pay costs. *New York Central Railroad* v. *Stoneman*, 81.

At a hearing by the Industrial Accident Board of the question, whether injuries received by an employee, who was a claimant in proceedings under the workmen's compensation act, were caused by the serious and wilful misconduct of the employer so that the claim came under the provisions of St. 1911, c. 751, Part II, § 3, the board can take judicial notice of general safety rules and regulations and machinery standards established by the State board of labor and industries under St. 1913, c. 813, as amended by St. 1916, c. 308. *Sciola's Case*, 407.

Upon a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" it was held that the court could not take judicial notice that extract of Jamaica ginger, of an alcoholic content of eighty-eight per cent, is in fact an intoxicating beverage, and that it is generally sold and used as such. *Commonwealth* v. *Sookey*, 448.

Inferences.

In a suit in equity to have a sale and conveyance of certain property under foreclosure of a mortgage set aside as having been procured by fraud it was held that it was a reasonable inference that the letters conveying to the plaintiff notice of the impending sale were received by him. *Porter* v. *Porter*, 422.

Matters of Common Knowledge.

A sale of whiskey would be a violation of those provisions of R. L. c. 100, which remain enforceable since the enactment of the Volstead act, both because, being a "distilled spirit," whiskey is included in the definition of intoxicating liquor in § 2 of the statute as well as by name in the definition in § 1 of Title II of the Volstead act, and because, as a matter of common knowledge, it is an intoxicating liquor. *Commonwealth* v. *Nickerson*, 281.

It is a matter of common knowledge that under present conditions a coal burning locomotive cannot draw a train without emitting cinders and smoke. *Shine* v. *New York, New Haven, & Hartford Railroad*, 419.

Matters of Conjecture.

Evidence upon a claim for compensation under the workmen's compensation act by the dependent mother of one who met his death while employed as a "bus boy" in a restaurant by falling down the shaft of an elevator which it was no part of his work to operate and which he had been instructed not to use and not to go near upon which it was held that all the facts and circumstances shown and every reasonable inference therefrom left conjectural what the employee was doing when he fell into the well and what was the exact cause of his death; and that the claimant therefore had not established her claim. *McMahon's Case*, 473.

Extrinsic affecting Writings.

Evidence at the hearing above described which it was held did not as a matter of law require a finding by the judge that the broker of the lessor knew that the premises were to be used by the plaintiff days and nights without interruption. *New York Central Railroad* v. *Stonemen*, 81.

Evidence, at the hearing above described, of conversations between the defendant and his agent, which tended to explain certain conduct of the defendant and to show that it was not a construction of the contract favorable to the plaintiff, which it was held properly was admitted. *Ibid.*

Evidence of negotiations and conversations preceding the issuing of a policy of insurance against fire or following its issuance and before a fire within its terms, which tend to modify or vary its terms is not admissible where the terms of the policy are not ambiguous. *Cass* v. *Lord*, 430.

Provisions in a policy of life insurance relative to authorization of changes therein upon which evidence at the trial of an action upon the policy tending to show that a collecting agent of the company told the beneficiary that the policy did not lapse until thirteen weeks' payments were overdue was held not to be sufficient to modify the policy or to constitute a waiver of its provisions. *Hayes* v. *Metropolitan Life Ins. Co.* 476.

Where a policy of life insurance was dated April 17 of a certain year, was delivered to the insured on April 18 and by its terms provided for the payment of premiums annually on May 1, and an assignment in writing of the policy, after by its provisions it had become a "paid-up policy," gave to the assignee a right to surrender the policy for its surrender value "at any anniversary of issue" it was held that the meaning of the words "anniversary of issue" was not clear from the documents themselves, and must

be interpreted in the light of all the circumstances attending their use. *Coleman* v. *New England Mutual Life Ins. Co.* 552.

Evidence in the above described suit upon which it was held that the words in the assignment, "anniversary of issue," meant May 1. *Ibid.*

Competency.

Evidence offered to controvert the testimony of a fellow employee at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car which it was held rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee. *Labrecque* v. *Donham*, 10.

Evidence at the trial of the action above described tending to show that certain witnesses were intoxicated when the accident happened which it was held should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony. *Ibid.*

Evidence at the trial of the action above described which it was held should have been admitted because it tended to prove that the witnesses for the plaintiff were intoxicated at the time of the accident and thus tended to controvert and to discredit their testimony. *Ibid.*

In a suit to restrain unlawful competition it was held that the defendant was not entitled as of right under the circumstances to prove sales made by him to customers which were his before he began the unfair competition, thereby to establish what he might have realized as profits if he had conducted his business without attempting to appropriate the benefit of the name of the plaintiff. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

At the trial of two actions of tort under R. L. c. 51, § 17, by an administrator respectively against a street railway company and the county of Essex for causing the death of the plaintiff's intestate at a draw in Plum Island bridge, evidence was not admissible to prove that, after the plaintiff's intestate was killed, the defendant street railway company erected new gates at both ends of the draw. *Braley* v. *Massachusetts Northeastern Street Railway*, 275.

It is not reversible error to exclude at a trial a question of an expert as to his interpretation of a boundary shown on a plan in evidence. *Howe* v. *Johnson*, 379.

Testimony, at the trial of actions for causing the death of a boy who seized a wire running from an electric transformer and was killed by reason of the high voltage of the electricity, of a companion of the boy who was killed, "I told him [immediately before the accident] not to touch it [the wires] and he said he was not afraid," was held to have been competent to prove that the plaintiff's intestate was aware of the danger of his action and was not in the exercise of due care when killed. *Robbins* v. *Athol Gas & Electric Co.* 387.

Where at the trial of the actions above described, after all the facts with reference to the transformers, wires and voltage had been placed before the jury, an expert called by the plaintiff was asked, whether in his opinion "that whole thing is safe or unsafe," the plaintiff expecting an opinion as

to the danger of leaving the apparatus unenclosed, and the testimony was excluded it was held that the exclusion was proper, the subject matter being one to be determined by the jury and not one upon which the opinion of an expert was competent. *Robbins* v. *Athol Gas & Electric Co.* 387.

A statement in a hospital record reading as follows: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)," which was offered, at the trial above described, by the defendant it was held properly was excluded, since its admission would have been in direct violation of St. 1905, c. 330, as amended by St. 1912, c. 442. *Inangelo* v. *Petterson*, 439.

Evidence of previous fires set by two of five defendants in an indictment charging the burning and procuring to be burned of certain buildings was held admissible, under appropriate instructions, at the trial of the indictment, to show the intent of the two defendants, who were implicated in the previous fires, in setting the fires charged in the indictment. *Commonwealth* v. *Leventhal*, 516.

Even if records of certain alleged rules established by the defendant, in the action above described, governing the conduct of its employees, were destroyed and therefore could not be put in evidence, testimony of a former employee of the defendant describing certain orders and instructions given to him by a claim agent of the defendant was not admissible in the absence of evidence of authority of the claim agent to issue such orders or instructions on behalf of the defendant. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Self-serving statements made by the plaintiff in rebuttal which it was held that, although the order in which evidence shall be introduced at a trial is wholly within the discretion of the trial judge, should have been excluded. *Ibid.*

Where, at the trial of an action for motor vehicle hire, the plaintiff and the defendant both testify that the agreement of hiring was made in a telephone conversation between them, but they differ as to the amount agreed upon as hire, testimony of one who stated that he was present when the plaintiff was telephoning to the defendant and heard the plaintiff state as "all right" a rate, which was the rate which the plaintiff had testified that he had named, is not hearsay evidence and is competent and admissible. *Jamaica Pond Garage, Inc.* v. *Woodside Motor Livery, Inc.* 541.

Relevancy and Materiality.

Evidence offered to controvert the testimony of a fellow employee at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car, which it was held rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee. *Labrecque* v. *Donham*, 10.

Evidence at the trial of the action above described tending to show that certain witnesses were intoxicated when the accident happened which it was held should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony. *Ibid.*

Evidence at the trial of the action above described which it was held should have been admitted because it tended to prove that the witnesses for the plaintiff were intoxicated at the time of the accident and thus tended to controvert and to discredit their testimony. *Labrecque* v. *Donham*, 10.

Evidence of the method of feeding and directions given by the shipper both before and after a change in the method of feeding employed by the railroad corporation which was held relevant upon the issues raised by the plaintiff and admitted properly in an action by a railroad corporation against the consignee of certain cattle for the value of hay placed by the railroad in each carload of cattle. *New York Central Railroad* v. *Sturtevant & Haley Beef & Supply Co.* 16.

At the trial of an action of tort against a deputy sheriff for the conversion of onions which he had attached upon a writ in an action against a third party, evidence is not admissible of statements made by that third party, not in the presence of the plaintiff, tending to show that he owned the onions. *Koski* v. *Haskins*, 346.

At the trial of the action above described, testimony of the defendant, called by the plaintiff, that, as deputy sheriff, he had sold the onions six days after the attachment, was admissible. *Ibid.*

At the trial of the action above described evidence of the price at which onions were sold at a sale six days after the attachment was competent as bearing upon the market value of the onions at the time of their attachment. *Ibid.*

Evidence in the action above described of a demand for the onions made upon the deputy sheriff by the plaintiff's attorney which was held immaterial. *Ibid.*

In the action above described it was held that testimony of a warehouseman, in whose warehouse the onions, when attached, were stored was admissible, independently of entries in his books, if he kept any, that the plaintiff had made the arrangements with him for the storage of the onions. *Ibid.*

Letters.

In a suit in equity to have a sale and conveyance of certain property under foreclosure of a mortgage set aside as having been procured by fraud it was held that it was a reasonable inference that the letters conveying to the plaintiff notice of the impending sale were received by him. *Porter* v. *Porter*, 422.

Opinion: Experts.

In a suit in equity to restrain the defendant from unlawful competition with the plaintiff's business by the use of a similar trade name it was held that a master to whom the suit was referred had discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

Expert evidence to determine the cost of goods sold by the defendant in the unfair competition which was the subject of the suit above described was held to have been admissible where it appeared that the defendants did not furnish all the information within their control as to the cost of goods and profits made by them. *Ibid.*

It is not reversible error to exclude at a trial a question of an expert as to his

interpretation of a boundary shown on a plan in evidence. *Howe* v. *Johnson*, 379.

Where at the trial of the actions above described, after all the facts with reference to the transformers, wires and voltage had been placed before the jury, an expert called by the plaintiff was asked, whether in his opinion "that whole thing is safe or unsafe," the plaintiff expecting an opinion as to the danger of leaving the apparatus unenclosed and the testimony was excluded it was held that the exclusion was proper, the subject matter being one to be determined by the jury and not one upon which the opinion of an expert was competent. *Robbins* v. *Athol Gas & Electric Co.* 387.

In an action for services rendered and disbursements made in raising a sunken lighter of the defendant, where the defendant claimed in recoupment damages due to the tearing of planks from the bottom of the lighter by reason of alleged negligence of the plaintiff, it was held that the question asked the defendant by his counsel, "What did the tearing off of those planks as they were torn off, in view of the condition of your boat, indicate about the skill or lack of skill of the operation?" was improper and rightly was excluded. *Betts* v. *Rendle*, 441.

Of Criminal Intent and Commission of other Crimes.

Evidence of previous fires set by two of five defendants in an indictment charging the burning and procuring to be burned of certain buildings was held admissible, under appropriate instructions, at the trial of the indictment to show the intent of the two defendants, who were implicated in the previous fires, in setting the fires charged in the indictment. *Commonwealth* v. *Leventhal*, 516.

Of Hospital Records.

A statement in a hospital record reading as follows: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)," which was offered, at the trial above described, by the defendant it was held properly was excluded, since its admission would have been in direct violation of St. 1905, c. 330, as amended by St. 1912, c. 442. *Inangelo* v. *Petterson*, 439.

In an action for personal injuries where a trial judge ruled that a hospital record which stated that the plaintiff "Vomited fluid twice resembling coffee grounds & had an odor of whiskey" might be "admitted as far as it relates to the treatment and medical history" of the plaintiff's case, it was held that the use of the record was too much restricted by the judge and that, under Sts. 1905, c. 330, § 2; 1912, c. 442, § 2, the statement in the record above quoted was evidence of the fact that the odor of whiskey in the *vomitus* existed very shortly after the accident and came from a use of whiskey before the plaintiff had boarded the defendant's car. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Of Ownership.

At the trial of an action of tort against a deputy sheriff for the conversion of onions which he had attached upon a writ in an action against a third party, evidence is not admissible of statements made by that third party,

not in the presence of the plaintiff, tending to show that he owned the onions. *Koski* v. *Haskins*, 346.

Of Return by Constable.

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate, of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated. *Coghlan* v. *White*, 165.

Of Telephone Conversations.

Where, at the trial of an action for motor vehicle hire, the plaintiff and the defendant both testify that the agreement of hiring was made in a telephone conversation between them, but they differ as to the amount agreed upon as hire, testimony of one who stated that he was present when the plaintiff was telephoning to the defendant and heard the plaintiff state as "all right" a rate, which was the rate which the plaintiff had testified that he had named, is not hearsay evidence and is competent and admissible. *Jamaica Pond Garage, Inc.* v. *Woodside Motor Livery, Inc.* 541.

Of Unlawful Interference.

Evidence of unlawful and unjustifiable interference, by the business agent of a union, with the business of the proprietor of a barber shop. *Godin* v. *Niebuhr*, 350.

Of Value.

At the trial of an action of tort against a deputy sheriff for conversion of onions which he had attached upon a writ in an action against a third party evidence of the price at which the onions were sold at a sale six days after the attachment was competent as bearing upon the market value of the onions at the time of their attachment. *Koski* v. *Haskins*, 346.

Plan.

It is not reversible error to exclude at a trial a question of an expert as to his interpretation of a boundary shown on a plan in evidence. *Howe* v. *Johnson*, 379.

Self-serving Statement.

Self-serving statements made by the plaintiff in rebuttal which it was held that, although the order in which evidence shall be introduced at a trial is wholly within the discretion of the trial judge, should have been excluded. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Testimony of Accomplice.

At the trial of an indictment charging several persons with a crime, where two of them, one after pleading guilty and the other after an entry of *nolle prosequi* had been made as to him, testified for the Commonwealth and

against their co-defendants, the first acknowledging participation in the crime and the second admitting knowledge that it was being contemplated, it was for the jury to determine what weight should be given to such testimony and whether, upon it alone, the remaining defendants should be convicted. *Commonwealth* v. *Leventhal*, 516.

Instructions given to the jury as to the testimony of the first of the two government witnesses above described in which there was no error. *Ibid.*

To contradict Witness.

Where a witness in direct examination has answered questions relating to a relevant matter by stating merely that he did not remember, the party calling him cannot introduce, for the purpose of contradicting his witness, evidence of statements previously made by the witness on the subject matter under inquiry. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Violation of Rule as Evidence of Negligence

At the trial of an action for personal injuries, brought under the federal employers' liability act against a railroad corporation by a flagman in its employ in interstate commerce it was error to permit the plaintiff to testify that one of the defendant's examiners had told him that a train was not to move backwards until a signal was given by the flagman who was protecting it in the rear, and that when he was injured the engineer had backed the train without receiving such a signal, it appearing that there was no such written or printed rule of the defendant and it not appearing that the examiner had authority from the defendant, express or implied, to make such a rule, to give such instructions, or to decide that the printed rules of the defendant should be so construed. *Howard* v. *New York, New Haven, & Hartford Railroad*, 370.

Violation of Statute as Evidence of Negligence.

It was held that the use of improper number plates upon a motor vehicle did not preclude an employee of the driver of a motor truck from recovering for personal injuries in an action against the receiver of a street railway company. *Labrecque* v. *Donham*, 10.

Applications of the doctrine, *res ipsa loquitur*, see appropriate subtitle under NEGLIGENCE.

Of Wagering Contract.

See WAGERING CONTRACTS.

In Proceedings under the Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE,

In suits in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

In probate proceedings, see appropriate subtitle under PROBATE COURT.

EXECUTION.

An execution, issued upon a judgment in an action of tort upon which the officer may arrest the judgment debtor without first demanding payment or searching for property on which to levy the execution. *Brazill* v. *Green*, 93.

EXTRADITION.

A warrant, issued by the Governor of this Commonwealth on a demand by the Governor of the State of Illinois for the extradition of one indicted by the grand jury of that State, and directed to "The Sheriffs, Deputy Sheriffs, Division of State Police Department of Public Safety, and other officers of and in the several cities and counties of this Commonwealth," cannot lawfully be served by an officer of the division of State police, department of public safety, he not being an officer designated in the warrant and the "division" not being an officer or a class of officers. *Graves's Case*, 493.

The mere fact that, at the time of the arrest upon a warrant issued by the Governor of this Commonwealth on a demand by the Governor of the State of Illinois for the extradition of one indicted by a grand jury of that State, the person arrested was at large in the custody of bail furnished for his release from custody under a previous extradition warrant based on an earlier indictment of a grand jury of the State of Illinois, did not invalidate the later arrest. *Ibid.*

Formal objections to an indictment found and returned by a grand jury of the State of Illinois are not grounds for the issuance of a writ of habeas corpus upon a petition filed in this Commonwealth by the defendant named in that indictment after his arrest under the authority of a warrant of the Governor of this Commonwealth issued upon a demand by the Governor of the State of Illinois for his extradition. *Ibid.*

The Governor of this Commonwealth, in determining the propriety of issuing a warrant under St. 1920, c. 399, when a demand is made upon him by a Governor of another State under R. L. c. 217, § 11, for the extradition of a fugitive from justice, may consider evidence outside the papers sent with the requisition. *Ibid.*

A warrant issued by the Governor of this Commonwealth under St. 1920, c. 399, upon a demand by a Governor of a sister State made under R. L. c. 217, § 11, for the arrest and rendition of a fugitive from justice under indictment in that State, is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled. *Ibid.*

FALSE ARREST.

Allegations in a count in a declaration in an action of tort by a woman against a corporation owning and conducting a department store upon which it was held that in legal effect the plaintiff sought to recover for the causing of her arrest unlawfully, and not for the slanderous words used; and that the count did not charge malicious prosecution. *Zinkfein* v. *W. T. Grant Co.* 228.

Evidence in the action above described where in a second count of the declaration the plaintiff alleged that the defendant by its servants and agents falsely imprisoned the plaintiff upon which it was held that a finding was not warranted that the defendant by its servants and agents unlawfully arrested the plaintiff, and a verdict should have been ordered for the defendant on the second count. *Zinkfein* v. *W. T. Grant Co.* 228.

In the action above described it was held that a finding was not warranted that the defendant caused the plaintiff to be falsely arrested, and a verdict should have been ordered for the defendant on the first count. *Ibid.*

In the above described action it also was held that the crime charged against the plaintiff by the defendant's manager and detective was a misdemeanor. *Ibid.*

It seems that the plaintiff in the above described action was not remediless, since an action will lie for a slanderous charge of a crime made in the presence of a police officer. *Ibid.*

FALSE IMPRISONMENT.

In an action of tort by a woman against a corporation owning and conducting a department store upon a count of the declaration which alleged that the defendant by its servants and agents falsely imprisoned the plaintiff whether knowledge on the part of the defendant, its servants or agents, of the falsity of the charge against the plaintiff or of facts which would have been the equivalent of such knowledge, and the malice inferable therefrom would have been sufficient to render the defendant liable in an action for false imprisonment, here was not determined, because no evidence was offered justifying the finding of such facts. *Zinkfein* v. *W. T. Grant Co.* 228.

It seems that the plaintiff in the above described action was not remediless, since an action will lie for a slanderous charge of a crime made in the presence of a police officer. *Ibid.*

FIRE.

Insurance against loss by fire, see appropriate subtitle under INSURANCE.

FITCHBURG.

The provision as to damages in St. 1912, c. 440, empowering the city of Fitchburg to do the work, previously authorized by St. 1901, c. 354, of constructing, maintaining and operating main drains and common sewers, was intended to enlarge the provision contained in the earlier statute, and entitled a merchant to damages resulting from access to his premises being cut off by work in the construction of a trunk sewer in a public way adjacent thereto, although there was no taking of any of his property. *F. F. Woodward Co.* v. *Fitchburg*, 364.

FRAUD.

In a suit in equity to have a sale and conveyance of certain property under foreclosure of a mortgage set aside as having been procured by fraud it was held that the findings of the master and reasonable inferences to be drawn therefrom did not warrant a finding of collusion and lack of good faith on the part of the defendants. *Porter* v. *Porter*, 422.

FRAUDS, STATUTE OF.

In an action of contract, where it appeared that the plaintiff who had been employed by the owner of certain property to find a purchaser of the property for him, and who had transmitted an offer to the defendant which was accepted, agreed to release the owner from his claim for services and commission in consideration of the defendant's promise to pay it, and that the defendant so agreed with the plaintiff, who released the owner, the owner stating that the arrangement was satisfactory to him it was held that the contract was not subject to the provisions of the statute of frauds. *Curran* v. *O'Donnell*, 357.

Evidence upon which it was held that where the owner of certain real estate orally agreed to sell it for a certain price and upon the payment of the price conveyed to the purchaser only about one half of what both parties intended should be conveyed, the purchaser could not maintain a suit in equity against him for reformation of the deed so that it would include the land omitted by mutual mistake. Following Glass *v.* Hulbert, 102 Mass. 24. *Tracy* v. *Blinn*, 585.

GENERAL COURT.

Evidence in an action for commissions earned under a contract in writing between a corporation and two of its officers for services rendered and to be rendered in the sale of certain real estate upon which it was held that the contract provided for payment to the plaintiff for services rendered in the use of improper influence upon members of the Legislature to whom a proposed statute was to be presented, and therefore was unenforceable because contrary to public policy. *Adams* v. *East Boston Co.* 121.

In the above described action it also was held that it is of no consequence that eventually there was no actual harm to the public in the passage of the statute, it being sufficient that the contract, when applied to the facts, inevitably tended to results which impaired not merely the character of the Legislature, but also the public confidence in its integrity. *Ibid.*

Prerequisites for jurisdiction of the General Court under art. 2 of the Amendments to the Constitution to constitute a city government in a town. *Attorney General* v. *Methuen*, 564.

Subsequent approval or ratification by a town, at a meeting "duly warned and holden," of action of the General Court purporting to constitute it a city without the making of the precedent application in accordance with the request or consent of the voters required by art. 2 of the Amendments to the Constitution, will not validate such action. *Ibid.*

Proceedings at annual town meetings of the inhabitants of Methuen resulting in an application to the Legislature for a limited town meeting form of government and the enactment of Spec. St. 1916, c. 116, which was duly accepted by the town, which it was held did not fulfil the requirements of art. 2 of the Amendments to the Constitution, so that a contention to the effect that the form of town government was so changed that a further change by the enactment of Spec. St. 1917, c. 289, without observance of the requirements of art. 2 of the Amendments to the Constitution, was valid, had no relevancy. *Ibid.*

A vote of a public meeting in the town hall of Methuen, which was favorable

to the enactment of a bill to institute a city government in the town, which it was held was not an application for such action to the General Court by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by art. 2 of the Amendments to the Constitution. *Attorney General* v. *Methuen*, 564.

GRADE CROSSING.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, conferred an authority coextensive with the statute which it amended, which thereafter must be read as if it originally had been in the amended form, and neither the provisions of the amending statute nor those of the statute as amended are restricted to railroad crossings altered after the amendment. *Selectmen of Brookline, petitioners*, 260.

Upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, after their amendment by St. 1908, c. 542, a highway bridge in a town, which had been built over a railroad in accordance with a decree following proceedings under Pub. Sts. c. 112, §§ 131, 132, ordering that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair," may be ordered to be rebuilt and a part of the expense of such rebuilding may be assessed upon the railroad. *Ibid.*

The provisions of St. 1908, c. 552, are not inconsistent with those of St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542. *Ibid.*

t. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution. *Ibid.*

A part of the expense of rebuilding a highway bridge over a railroad or of making any structural change or renewal for the purpose of strengthening or improving it upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, may be assessed upon the railroad corporation although it receives no benefit therefrom. *Ibid.*

Where, after a decree of county commissioners that a highway bridge over a railroad in a town should be rebuilt, the town carried the decree into effect "by agreement of all parties . . . and . . . paid the charges and expense of rebuilding" previous to a decree in proceedings instituted by it under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, the railroad company, at the trial of an application under § 27 of the amended statute for a jury to revise the report of the special commission appointed under the amended §§ 23, 25, is entitled to a ruling that it need not pay to the town interest upon that part of the amount so expended by the town which afterwards was apportioned to be paid by the railroad company. *Ibid.*

In the proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, above described, which were new proceedings, the intent and understanding of the parties to the proceedings under Pub. Sts. c. 112, §§ 131, 132, which resulted in the construction of the original bridge, were held to be immaterial. *Ibid.*

GRAND JURY.

See PRACTICE, CRIMINAL, *Abatement.*

HABEAS CORPUS.

See WRIT OF HABEAS CORPUS.

HIGHWAY.

See WAY, *Public.*

HUSBAND AND WIFE.

Evidence in an action by a husband and wife jointly against a stockbroker for money paid in transactions alleged to have been of the character described in R. L. c. 99, § 4, which was held a sufficient basis for a finding that the husband acted as the agent for his wife and that his intention bound the defendant so far as her interests were affected. *Barrell* v. *Paine*, 157.

Upon a certain petition in the Probate Court under R. L. c. 153, § 33, by a wife against her husband it was held that the Probate Court had jurisdiction and power to enter a decree under § 37 of that chapter, reciting that the parties were living "separately," giving to the petitioner the care and custody of the child and directing the respondent to make certain payments toward the support of the child. *Marshall* v. *Marshall*, 248.

Upon a certain petition in the Probate Court under R. L. c. 153, § 33, by a wife against her husband it was held that the respondent was not deprived of rights without due process of law but had full opportunity to be heard upon the issues which were shown by the petition. *Ibid.*

Evidence in a libel for divorce upon which it was held that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4. *Field* v. *Field*, 256.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life. *Ibid.*

Provisions of an agreement entered into by a husband and wife with a trustee in settlement of a suit in the Probate Court for separate maintenance upon which in a libel for divorce it was held that the contract must be construed as being intended only to settle the husband's legal obligations while the marriage relation existed, and that it did not have divorce in view. *Kerr* v. *Kerr*, 353.

In the above described libel it was held that the power of the Superior Court upon granting the divorce also to make a decree for alimony and for suitable provision for the minor child was not abrogated by the agreement. *Ibid.*

In the above described libel the question, whether the power of the Probate Court to increase the allowance it had decreed to the wife and child if, in circumstances arising after the decree, such sum became inadequate for their maintenance was limited by the contract of the parties with the trustee, not being raised by the record, was not considered. *Ibid.*

To what extent a contract of a husband and his wife with a trustee, which purported to provide for alimony to be paid to the wife in the event of a divorce afterwards being procured by her and which was made without the sanction of the court, might affect the power of the court to award alimony in such subsequent divorce suit, was not determined, the contract in question in this case contemplating the relations of the parties only during the continuance of the marriage relation. *Kerr* v. *Kerr*, 353.

ICE.

See SNOW AND ICE.

INCOME.

Tax on income, see appropriate subtitle under TAX.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INFANT.

A corporation, maintaining at a beach resort an amusement device, which in part consists of a slide down which one using it is propelled to a moving belt whence he jumps to the floor, in the absence of any negligence in its construction, condition or operation, is not liable for personal injuries received by one who, having used the device five or six times before so that he is familiar with the manner of its use and the sensation caused thereby, enters it when a large crowd is present and, because of the crowd, is injured when he jumps from the moving belt. *Sullivan* v. *Ridgway Construction Co.* 75.

The decision above described was reached without considering any defence involved in the fact that the injured person was a minor and had entered the device upon a ticket having on its reverse side this language: "No charge is made for the use of Amusement Devices in the Pit or Gymnasium, but persons using same agree to assume all risk of personal injury and loss or damage to property." *Ibid.*

INSURANCE.

An automobile dealer is bound by the provisions of a policy of insurance against loss by fire of his automobile, although he neither read the policy nor an accompanying rider nor knew "a single condition in" it, if he voluntarily accepted it and kept it in his safe until a loss by fire occurred. *Cass* v. *Lord*, 430.

In an action upon a policy of insurance against loss by fire issued to an automobile dealer and providing that it should "attach and cover upon automobiles, bodies, chassis, tops or other equipment while attached to and a part of automobiles owned by the assured and held by him for sale" it was held that the words, "automobiles owned by the assured and held by him for sale" were not ambiguous; and that evidence of negotiations and conversations preceding the issuing of the policy or following its issuance and

before a fire within its terms, which tend to modify or vary its terms, were not admissible. *Cass* v. *Lord*, 430.

A provision in the policy above described which it was held could not be overcome by invoking the aid of the doctrine of waiver and estoppel based on interviews of the assured with agents of the insurance company after he had received and had accepted the policy. *Ibid.*

Provisions in the rider attached to and made a part of the policy above described in evidence at the trial of an action upon the policy for the loss of nineteen automobiles of the plaintiff damaged by fire, where it appeared that, as to thirteen of the automobiles, the plaintiff had not reported to the company acquisition of ownership and possession "as soon as known" to him, and that such failure had not arisen from unavoidable mistake or excusable inadvertence on his part, upon which it was held that the plaintiff could not maintain the action. *Ibid.*

Evidence in an action by an automobile dealer against an insurance agent for breach of an oral agreement to procure and deliver to the plaintiff a valid policy of insurance against fire upon certain automobiles upon which it was held that a verdict properly was ordered for the defendant. *Ibid.*

Life.

Payment of premiums.

Where a policy of life insurance provides that premiums shall be paid weekly and that a "grace of four weeks shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force," a certain authorization by the insurance company of its agents to collect premiums not more than thirteen weeks in arrears upon which payment the former insured shall "be regarded as having been wholly restored to benefit," it was held does not require an agent to accept such payment of overdue premiums. *Hayes* v. *Metropolitan Life Ins. Co.* 476.

If an agent, in the circumstances above described, refuses to accept a tender, made more than four weeks but less than thirteen weeks after a failure to pay a premium subsequent to the first, of an amount equalling all arrearages of premiums and one week's premium in advance, the policy, which had lapsed, is not reinstated. *Ibid.*

Assignment of policy.

Where a policy of life insurance was dated April 17 of a certain year, was delivered to the insured on April 18 and by its terms provided for the payment of premiums annually on May 1, and an assignment in writing of the policy, after by its provisions it had become a "paid-up policy," gave to the assignee a right to surrender the policy for its surrender value "at any anniversary of issue" it was held that the meaning of the words "anniversary of issue" was not clear from the documents themselves, and must be interpreted in the light of all the circumstances attending their use. *Coleman* v. *New England Mutual Life Ins. Co.* 552.

Evidence in the above described suit upon which it was held that the words in the assignment, "anniversary of issue," meant May 1. *Ibid.*

Surrender of policy.

Where a policy of life insurance was dated April 17 of a certain year, was delivered to the insured on April 18 and by its terms provided for the pay-

ment of premiums annually on May 1, and an assignment in writing of the policy, after by its provisions it had become a "paid-up policy," gave to the assignee a right to surrender the policy for its surrender value "at any anniversary of issue" it was held that the meaning of the words "anniversary of issue" was not clear from the documents themselves, and must be interpreted in the light of all the circumstances attending their use. *Coleman* v. *New England Mutual Life Ins. Co.* 552.

Evidence in the above described suit upon which it was held that the words in the assignment, "anniversary of issue," meant May 1. *Ibid.*

INTENT.

Evidence of intent and state of mind, see appropriate subtitle under EVIDENCE.

INTEREST.

Provisions in a contract under which it was held that an action of contract for money had and received cannot be maintained against a municipal corporation for three per cent of an amount of money which, after it had become due to the plaintiff as the general contractor for the building of a school house, the defendant during the pendency of litigation begun by subcontractors under St. 1909, c. 514, § 23, had held on deposit in a bank account containing its general funds, receiving three per cent interest on the entire fund. *Goldman* v. *Worcester*, 319.

INTERFERENCE.

UNLAWFUL INTERFERENCE, see that title

INTOXICATING LIQUORS.

Since, at the time of the adoption of art. 18 of the Amendments to the Constitution of the United States, there was no such universal or settled definition of the word "concurrent" as to lead to the conviction that it was employed in § 2 of the amendment in reliance upon a judicially established meaning, its meaning as there used must be determined from its context, the purpose sought to be accomplished and a consideration of authoritative adjudications where the discussion of kindred constitutional problems has been involved. *Commonwealth* v. *Nickerson*, 281.

By the words of § 2 of art. 18 of the Amendments to the Constitution of the United States, the Commonwealth possesses a continuous and independent power to enact legislation actually tending to render efficient, through its executive and judicial departments, the terms of that amendment, which legislation, in definitions, administrative agencies and penalties, may differ from but cannot be antagonistic to legislation enacted by Congress to carry out the purposes of the amendment. *Ibid.*

State legislation, so far as in its practical operation it is appropriate to enforce the chief aim of art. 18 of the Amendments to the Constitution of the United States and to make it more completely operative in all its amplitude, is not suspended, superseded, set aside nor rendered inapplicable in its denounce-

ments by 41 U. S. Sts. at Large, 305, known as the Volstead act, in so far as it is not incompatible with or in contravention of the provisions of that federal statute. *Commonwealth* v. *Nickerson*, 281.

Provisions of R. L. c. 100, which remain in effect since the adoption of art. 18 of the Amendments to the Constitution of the United States and the enactment of the Volstead act, 41 U. S. Sts. at Large, 305, and which the courts of the Commonwealth have power and jurisdiction to enforce. *Ibid.*

The provisions of R. L. c. 100, which aim at the suppression of sales of liquor containing more than one per cent of alcohol remain in force, since they tend toward the same result as that sought by the Volstead act and seek to attain that result by means in harmony with its provisions. *Ibid.*

The definition of intoxicating liquor in R. L. c. 100, § 2, manifests but a small practical difference from that in Title II, § 1, of 41 U. S. Sts. at Large, 305, the Volstead act, cannot be said as matter of law to include liquor in fact intoxicating, is not unreasonable, does not authorize that which the Volstead act forbids but merely fails to punish some conduct which the Volstead act denounces, provides rational and effective means for the enforcement of the chief aim of art. 18 of the Amendments to the Federal Constitution, and therefore is not obstructive of the provisions of and the purposes sought by the amendment and the Volstead act. *Ibid.*

The provisions of R. L. 100, concerning the prohibition of sales of intoxicating liquor, the definition of intoxicating liquor, the penalties for the violations of these and similar provisions, and the means of enforcing them, constitute an exercise of the legislative power of the Commonwealth which, under § 2 of art. 18 of the Amendments to the Federal Constitution, giving to Congress and the several States "concurrent power" to enforce the article by appropriate legislation, the courts of this Commonwealth still have power and jurisdiction to enforce. *Ibid.*

The circumstances that R. L. c. 100 was enacted and was in force previous to the adoption of art. 18 of the Amendments to the Federal Constitution, does not prevent the above described provisions of that statute from being "appropriate legislation," by which, under the "concurrent power" granted by § 2 of the amendment, the amendment may be enforced by the Commonwealth. *Ibid.*

A sale of whiskey would be a violation of those provisions of R. L. c. 100, which remain enforceable since the enactment of the Volstead act, both because, being a "distilled spirit," whiskey is included in the definition of intoxicating liquor in § 2 of that statute as well as by name in the definition in § 1 of Title II of the Volstead act, and because, as a matter of common knowledge, it is an intoxicating liquor. *Ibid.*

The fact that Jamaica ginger contains eighty-eight per cent of alcohol does not make it "intoxicating liquor" within the definition of R. L. c. 100, § 2, unless it is shown to be a "beverage," that is, a liquor for drinking. *Commonwealth* v. *Sookey*, 448.

Evidence at the trial of a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" upon which it was held that there was no evidence that the article sold was fit for beverage purposes, nor that it ordinarily was so used. *Ibid.*

In the case above described it was held that the court could not take judicial notice that extract of Jamaica ginger, of an alcoholic content of eighty-

eight per cent, is in fact an intoxicating beverage, and that it is generally sold and used as such. *Commonwealth* v. *Sookey*, 448.

In the above described case it was held that a verdict of guilty was not warranted. *Ibid.*

Where a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" was tried upon agreed facts it was held that even if the facts agreed upon had warranted a finding that the Jamaica ginger sold was an intoxicating beverage, that issue, being one of fact, should have been submitted to the jury. *Ibid.*

Where at the trial of an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while a passenger, he was thrown, there was evidence tending to show that, shortly before entering the street car, the plaintiff had drunk intoxicating liquor, and the defendant contended that in consequence thereof he became intoxicated and that his fall from the car was the result of such intoxication, it was held that the question, how far, if in any degree, the use of the intoxicating liquor caused the plaintiff's fall or contributed to his injuries, was for the jury. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

If voluntary intoxication on the part of the plaintiff in the action above described was found to be the direct and proximate cause of his fall from the car upon which he was a passenger, his rights as a passenger ceased when he fell, and thereafter he had the rights only of a traveller upon the highway. *Ibid.*

At the trial of the action above described, there was no evidence that either the motorman or the conductor of the street car upon which the plaintiff was a passenger had any knowledge of his intoxicated condition, if such condition existed, and it therefore was held, that the decision in Black *v.* New York, New Haven, & Hartford Railroad, 193 Mass. 448, was not applicable. *Ibid.*

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JAMAICA GINGER.

Where a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" was tried upon agreed facts it was held that even if the facts agreed upon had warranted a finding that the Jamaica ginger sold was an intoxicating beverage, that issue, being one of fact, should have been submitted to the jury. *Commonwealth* v. *Sookey*, 448.

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Evidence at the trial of a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" upon which it was held that there was no evidence that the article sold was fit for beverage purposes, nor that it ordinarily was so used. *Ibid.*

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JUDGMENT.

Where, by a writ of error a judgment of the Superior Court is taken to the Supreme Court of the United States and the writ there is dismissed for want of jurisdiction, the Superior Court has no further power over the judgment, which remained in full force and effect, and has no power to grant a motion by the defendant that the judgment be "set aside," or a motion by the plaintiff that it be affirmed, or to order a judgment following the mandate. *Duart* v. *Simmons*, 225.

Evidence at the trial of an action upon a judgment of a court of the State of New York of general jurisdiction upon which it was held that the presumption in favor of the judgment of the New York court was not overcome as a matter of law and the recitals of the record of the judgment as to service upon the defendant were properly considered. *Robinson* v. *Freeman*, 446.

On an exception to the dismissal of a petition for the vacation of a judgment for the defendant in an action brought by the petitioner as plaintiff, it was held that an order that the action be continued "to be disposed of on or before January 7, 1918, or to be on that date dismissed; no further extension to be granted to the plaintiff" rested in the sound discretion of the Superior Court and there was nothing to show an unwise exercise of that discretion. *Porter* v. *Travelers Ins. Co.* 524.

In the action above described it was held that the granting or denial of a petition to vacate a judgment is largely discretionary, and the record did not show a failure to exercise sound judgment. *Ibid.*

JURISDICTION.

Evidence in an action of contract or tort between two mining corporations not incorporated in this Commonwealth for the conversion of ore from veins, lodes and ledges which had their apexes within the plaintiff's surface boundaries in Arizona and for money had and received from its sale upon which it was held that the record presented a cause arising out of a *bona fide* dispute as to the title to real estate, where the primary question involved was the title. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185.

In the above described action it was held that the courts of this Commonwealth will not take jurisdiction of such an action, it being one local to the State of Arizona. *Ibid.*

In the same action it was held that such a determination violates no constitutional right of the plaintiff given either by art. 14 of the Amendments to the Federal Constitution, or by art. 4, § 2, of that Constitution. *Ibid.*

Statement by RUGG, C. J., of the reasons for the distinction between local and transitory actions. *Ibid.*

The rule that, where a trespasser severs wood, gravel or other parts of the realty from land and transfers it into money, the owners of the land may waive the trespass and maintain an action of contract against the wrong-

doer for money had and received, does not apply where the owner has been disseised or where there is an honest controversy between the parties as to who is the owner of the land; but in such circumstances the owner must seek to enforce his rights in a court vested with jurisdiction to try the title to the land as a local action. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185.

The courts of this Commonwealth will not take jurisdiction of an action of contract under §§ 4047, 4048 and 4051 of the Rev. Sts. of the State of Arizona (1913), between the owners of adjacent mines in that State, to compel the payment of a proportionate part of the expense of pumping water from the defendant's mine, such action being local in its character. *Ibid.*

Evidence in a libel for divorce upon which it was held that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4. *Field* v. *Field*, 256.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life. *Ibid.*

Provisions of R. L. c. 100, which remain in effect since the adoption of art. 18 of the Amendments to the Constitution of the United States and the enactment of the Volstead act, 41 U. S. Sts. at Large, 305, and which the courts of the Commonwealth have power and jurisdiction to enforce. *Commonwealth* v. *Nickerson*, 281.

The provisions of R. L. 100, concerning the prohibition of sales of intoxicating liquor, the definition of intoxicating liquor, the penalties for the violations of these and similar provisions, and the means of enforcing them, constitute an exercise of the legislative power of the Commonwealth which, under § 2 of art. 18 of the Amendments to the Federal Constitution, giving to Congress and the several States "concurrent power" to enforce the article by appropriate legislation, the courts of this Commonwealth still have power and jurisdiction to enforce. *Ibid.*

An appeal from an order, decree or denial of a Probate Court or of a judge of that court under St. 1919, c. 274, §§ 1, 2, is not pending before the full court of the Supreme Judicial Court until the papers specified in R. L. c. 157, § 21, shall have been prepared and filed in that court and the entry fee required by R. L. c. 204, § 6, has been paid. *Littlejohn* v. *Littlejohn*, 326.

A motion for dismissal of an appeal from a decree of the Probate Court under St. 1919, c. 274, § 1, for want of prosecution in failing to prepare and file with the full court of the Supreme Judicial Court the papers required by § 2 of that statute and by R. L. c. 157, § 21, cannot be made before the full court of the Supreme Judicial Court, but should be made in the Probate Court. *Ibid.*

There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction. *Robinson* v. *Freeman*, 446.

Evidence at the trial of an action upon a judgment of a court of the State of New York of general jurisdiction upon which it was held that the presumption in favor of the judgment of the New York court was not overcome as a matter of law and the recitals of the record of the judgment as to service upon the defendant were properly considered. *Robinson* v. *Freeman*, 446.

Where a judge of the Superior Court who heard a demurrer to a bill in equity filed a report to this court in which he stated that he sustained the demurrer, but no formal decree to that effect was entered and a motion by the defendant that the report be discharged for failure of the plaintiff to enter it in this court was allowed a year and a half later and subsequently a motion by the defendant for the entry of a formal decree sustaining the demurrer on the ground that the matter already had been decided by the first judge was allowed by a second judge as of the date of the filing of the report by the first judge, upon an appeal from such decree, where the record did not include a report of evidence, it was held, that it was not essential that the motion be decided by the same judge who filed the report. *Reno* v. *Cotter*, 556.

In the above described suit it was held that the statement in the report by the first judge that he had made an order sustaining the demurrer was a sufficient foundation for the subsequent entry, *nunc pro tunc*, upon the order of the second judge, of an interlocutory decree to that effect. *Ibid.*

In the above described suit it was held that so far as the decree included a ruling of law, it was within the jurisdiction and power of the court and was warranted. *Ibid.*

Prerequisites for jurisdiction of the General Court under art. 2 of the Amendments to the Constitution to constitute a city government in a town. *Attorney General* v. *Methuen*, 564.

In quo warranto proceedings brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and prerogatives of a municipal corporation have been usurped in which it is alleged that a statute incorporating a town as a city was invalid because contrary to art. 2 of the Amendments to the Constitution, the municipality nominally and in fact exercising the franchises and prerogatives alleged to have been usurped may be made the party defendant. *Ibid.*

The provisions of the workmen's compensation act are not operative in favor of a dependent of an employee of a subscriber under the act who lost his life from causes arising out of and in the course of his employment as mate upon a steam lighter used by the employer in coastwise traffic for the transportation of sand and gravel between Scituate and Boston and while the vessel was within three miles of shore. *Dorman's Case*, 583.

EQUITY JURISDICTION, see that title.

Of PROBATE COURT, see that title.

JURY AND JURORS.

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding

for contempt, wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional. *Walton Lunch Co.* v. *Kearney*, 310.

A petitioner for the writ of habeas corpus has no right to a trial by jury of facts placed in issue by the pleadings. *Graves's Case*, 493.

Article 5 of the Amendments to the Constitution of the United States does not apply to proceedings in the courts of the Commonwealth; and therefore a plea in bar to an indictment must be overruled if the ground of the plea is only that the defendants were lawfully summoned and were required to testify "at the sitting of the Grand Inquest" concerning the matters which were there inquired into and which were the subject matter of the indictment and that by the further prosecution of the indictment the defendants were "deprived of the privileges and immunities guaranteed" in that amendment to the Federal Constitution. *Commonwealth* v. *Leventhal*, 516.

It was said, that, on the plea in bar above described, the questions, whether the defendants when compelled to testify before the grand jury were deprived of their rights under art. 12 of the Declaration of Rights of our Commonwealth, and the extent to which their general plea of not guilty was a waiver of their rights, were not before this court. *Ibid.*

LABOR AND LABOR UNION.

A strike of a labor union against a corporation, which is not in violation of any contract between the employer and the employed, is legal if it is caused by a breach of good faith and of square dealing on the part of an officer of the corporation in failing intentionally, without apparent excuse and without notice, to keep an appointment, deliberately made with representatives of the union at a conference touching their contractual relations with each other, for a further conference at a specified time and place. *Walton Lunch Co.* v. *Kearney*, 310.

Evidence in a suit by the proprietor of a restaurant against members and officers of a labor union which include his employees upon which it was held that a final decree was warranted and proper, which perpetually enjoined and restrained the defendants "from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass and intimidate the plaintiff's customers or intending customers, or his present employees or those desirous of entering his employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract." *Ibid.*

It was stated that, by an appeal from the final decree in the suit above described, questions as to the lawfulness in general of any kind of picketing and as to the interpretation of St. 1913, c. 690, were not raised. *Ibid.*

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt, wherein the petition alleges a violation of an injunction

which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional. *Walton Lunch Co.* v. *Kearney*, 310.

Evidence upon which the handing out to passers-by in front of a barber shop by the business agent and secretary of a local barber's union of printed cards stating that the proprietor was "Unfair to Organized Labor. He refuses to employ Union Barbers or conduct a Union Barber Shop," may be found to be an unlawful and unjustifiable interference with the business of the proprietor of the shop for which an action of tort may be maintained. *Godin* v. *Niebuhr*, 350.

Evidence at the trial of an action brought under the circumstances above described upon which it was held that for the invasion of his rights the plaintiff was entitled to at least nominal damages. *Ibid.*

In the action above described it was held that there was evidence of specific damages. *Ibid.*

Evidence at the trial of the above described action upon which it was held that the jury might well have inferred that the intended and natural result of the defendant's wrongdoing was substantially to injure the plaintiff's business. *Ibid.*

A strike of workmen which is for the sole object of compelling the employer to re-employ a discharged fellow workman of the strikers is a strike for an unlawful purpose, and it will be enjoined in a suit in equity by the employer against the strikers, even if no illegal means are employed to carry it into effect. *Mechanics Foundry & Machine Co.* v. *Lynch*, 504.

LAND COURT.

Notice.

A respondent in a petition in the Land Court, if he has a full opportunity to be heard, is not harmed by a refusal by the judge to give further notice to other persons who do not appear in the proceedings. *Prentiss* v. *Gloucester*, 36.

Findings by Judge.

A refusal by a judge of the Land Court to grant a request for a finding of fact is not subject to an exception. *Prentiss* v. *Gloucester*, 36.

Upon an appeal to this court from a decree of the Land Court upon a petition for the registration of the title to land, only questions of law are open; and a finding of fact by the trial judge without a report of the evidence will not be reviewed. *Solovicos* v. *MacLachlan*, 402.

Exceptions.

Upon exceptions, by certain respondents in a petition in the Land Court for the registration of the title to a certain parcel of land on Eastern Point in Gloucester, to rulings that the respondents were not entitled to a right of way over the petitioner's land, it was held that there was no necessity for considering what right of way, if any, owners of land on the Point, other than the excepting respondents, might have, except so far as the existence of such rights might be pertinent to the exceptions. *Prentiss* v. *Gloucester*, 36.

Upon the above described petition it was held that an order for registration for the petitioner, excluding any right of way for the respondents imported a finding of all subsidiary facts essential to support it. *Prentiss* v. *Gloucester*, 36.

Evidence at the hearing of the petition above described, upon which it was held, that a ruling that the city had no easement or other rights in the road in question over the petitioner's land was wrong and that the exception by the city to the ruling must be sustained. *Ibid.*

A refusal by a judge of the Land Court to grant a request for a finding of fact is not subject to an exception. *Ibid.*

Decree.

Upon a petition for the registration of the title to land it was held that an order for registration for the petitioner, excluding any right of way for the respondents imported a finding of all subsidiary facts essential to support it. *Prentiss* v. *Gloucester*, 36.

Appeal.

Upon an appeal to this court from a decree of the Land Court upon a petition for the registration of the title to land, only questions of law are open; and a finding of fact by the trial judge without a report of evidence will not be reviewed. *Solovicos* v. *MacLachlan*, 402.

LANDLORD AND TENANT.

Construction of Lease and Covenants.

In an action by the lessee against the lessor for damages resulting from a failure to supply heat, it was held that certain words stricken from a lease in writing before its execution could not be restored and could not be used in its construction. *Kennon* v. *Sheparā*, 57.

In the above described action it also was held that the fair import of tne words used was that, while the lessor promised to heat the premises he was to be under no liability in case he failed to do so. *Ibid.*

In the above described action it also was held that no rule of law preven the making of such an agreement. *Ibid.*

In the same action it was held that the word "him" in the clause, "without liability to him," referred to the lessee. *Ibid.*

Evidence in a suit in equity by a railroad corporation against a mortgagee in possession of certain real estate which the mortgagor had let to the plaintiff by a lease in writing whose provisions the mortgagee had agreed to be bound by, among others a provision relating to heat to be furnished by the lessor which was ambiguous as to whether the premises should be heated nights and on holidays and Sundays, upon which, on appeal, it was held that no error appeared in the findings or rulings of the judge ordering a final decree entered dismissing the bill. *New York Central Railroad* v. *Stoneman*, 81.

Evidence at the hearing above described which it was held did not as a matter of law require a finding by the judge that the broker of the lessor knew that the premises were to be used by the plaintiff days and nights without interruption. *Ibid.*

Evidence, at the hearing above described, of conversations between the defendant and his agent, which tended to explain certain conduct of the defendant and to show that it was not a construction of the contract favorable to the plaintiff, which it was held properly was admitted. *New York Central Railroad* v. *Stoneman*, 81.

Ratification of Lease.

The bringing by the lessor named in a lease in writing and under seal of an action against the lessee for breach of the contract to pay rent is a ratification by the lessor of the signing, sealing and delivery of the lease in his name, although it was so executed and delivered by one who had no authority to do so. *Gross* v. *Cohen*, 468.

The execution and delivery of a lease of real estate on behalf of the lessor by one who had no authority so to do may be ratified by the lessor although the instrument contains no statement that it was executed by an agent. *Ibid.*

Option for Purchase or Renewal contained in Lease.

A contract creating an equitable interest in land which it was held was not a mere option to purchase. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Questions presented and determined in a suit for specific performance of a contract to sell certain land which it was held had nothing to do with options for purchase or renewal contained in leases. *Ibid.*

Eviction.

Evidence upon which it was held that the lessee of a second floor apartment of a two-family dwelling house whose wife persistently hung clothes to dry on lines upon a piazza over the front entrance to the house could not maintain a suit in equity to restrain the lessor from ejecting him for breach of a covenant in the lease not to "make or suffer any unlawful, improper, noisy or otherwise offensive use" of the premises. *Finkovitch* v. *Cline*, 196.

In the above described suit it was held that the defendant was entitled to have the suit dismissed with costs since equity will not afford its shield against the natural consequences of contumaciously wrongful conduct. *Ibid.*

Repairs.

The obligation of the landlord of a two-family tenement house to a tenant and his invited guests relating to repair of a piazza used in common by the tenants, where no express agreement on the subject has been made, is that he shall exercise due care to keep the piazza in such condition as, to a person of ordinary observation, it would appear to be in at the time of letting. *Kirby* v. *Tirrell*, 170.

Where, at the trial of an action by a guest of a tenant in a two-family tenement house against the landlord for personal injuries received when a board of a piazza, used in common by the tenants, broke as the plaintiff stepped upon it, there is no evidence to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or at any time before the

accident to the plaintiff, it is proper to order a verdict for the defendant. *Kirby* v. *Tirrell*, 170.

Evidence at the trial of the action above described which it was held did not warrant a finding that the defective board was not in the same condition as to safety as it appeared to be in at the time of the letting, or a finding that, by exercising ordinary diligence, the defendant could have discovered or remedied the defect before the accident. *Ibid.*

Landlord's Liability in Tort to Persons invited upon Premises.

The obligation of the landlord of a two-family tenement house to a tenant and his invited guests relating to repair of a piazza used in common by the tenants, where no express agreement on the subject has been made, is that he shall exercise due care to keep the piazza in such condition as, to a person of ordinary observation, it would appear to be in at the time of letting. *Kirby* v. *Tirrell*, 170.

Where, at the trial of an action by a guest of a tenant in a two-family tenement house against the landlord for personal injuries received when a board of a piazza, used in common by the tenants, broke as the plaintiff stepped upon it, there is no evidence to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or at any time before the accident to the plaintiff, it is proper to order a verdict for the defendant. *Ibid.*

Evidence at the trial of the action above described, which it was held, did not warrant a finding that the defective board was not in the same condition as to safety as it appeared to be in at the time of the letting, or a finding that, by exercising ordinary diligence, the defendant could have discovered or remedied the defect before the accident. *Ibid.*

LEGACY.

See Devise and Legacy.

LEGISLATURE.

See General Court.

LEGITIMACY.

Evidence in a proceeding under the workmen's compensation act upon which it was held that illegitimate children living with their mother and putative father at the time of his death were members of his family and entitled to compensation. *Gritta's Case*, 204.

LIBEL AND SLANDER.

Allegations in a count in a declaration in an action of tort by a woman against a corporation owning and conducting a department store upon which it was held that in legal effect the plaintiff sought to recover for the causing of her arrest unlawfully, and not for the slanderous words used; and that the count did not charge malicious prosecution. *Zinkfein* v. *W. T. Grant Co.* 228.

LOWELL.

Where land had been taken by the city of Lowell by right of eminent domain and the owner had brought a petition for a jury for the assessment of his damages and had received, as payment *pro tanto* and without prejudice, a sum of $19,650 which the council previously had awarded on his claim, a vote of the city council, while the action of the landowner was pending, to pay to him the further sum of $2,772.51 "in settlement of" the cause of action, although it recites that it is a vote "of urgent necessity for the immediate preservation of the public peace, health and safety," is not such a vote and, if it is passed without having been proposed in writing and without a notice of it having been published in a newspaper of the city not less than one week before its passage, it is void under § 27 of the charter of the city of Lowell, St. 1911, c. 645. *Merrill* v. *Lowell*, 463.

The requirement of § 27 of the charter of the city of Lowell, St. 1911, c. 645. that a vote of the city council of five members, appropriating money in excess of $500 or authorizing a contract involving liability in excess of $500 in a matter for the immediate preservation of the public peace, health or safety, to be valid must be passed by a four fifths vote, is not satisfied by a unanimous vote at a meeting of the council when only three members are present. *Ibid.*

Whether the requirement of St. 1911, c. 645, § 27, that a vote of the city council of Lowell upon such a matter as above described shall contain a statement of its urgency is satisfied by a mere statement, "This vote is of urgent necessity for the immediate preservation of the public peace, health and safety," without mentioning the particular facts constituting the emergency, was not determined. *Ibid.*

MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

MALICIOUS PROSECUTION.

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

MANDAMUS.

The writ of mandamus is not directed to an office, but to the person holding the office. *Knights* v. *Treasurer & Receiver General*, 336.

If, after a petition for a writ of mandamus, commanding one holding the office of Treasurer and Receiver General of the Commonwealth not to distribute and pay over certain funds has been reserved for determination by this court, the respondent resigns his office, his resignation is accepted and his

successor is appointed and qualifies, a plea in abatement then filed by the respondent must be sustained, and a motion by the petitioner to amend the petition by substituting as respondent the original respondent's successor in office must be denied. *Knights* v. *Treasurer & Receiver General*, 336.

A member of the repair and construction division or of the veterinary service or of the fire alarm branch of the fire department of the city of Boston is, under St. 1909, c. 308, as amended by St. 1911, c. 134, a member of "said department" and entitled to vote for the twelve members of that department, who, with the fire commissioner, constitute The Boston Firemen's Relief Fund; and if the corporation denies to him that right, a writ of mandamus may be issued upon his petition to compel the corporation to recognize it. *Nolan* v. *Firemen's Relief Fund*, 420.

It is not a condition precedent to the granting of the petition for a writ of mandamus above described that the petitioner shall have made an express demand upon the corporation for a recognition of his right if it appears that such a demand would have been futile. *Ibid.*

MARLBOROUGH.

A provision of the charter of the city of Marlborough which it was held vests in the city council the authority and duty to authorize the erection of school houses subject to the limitation that no final action can be taken until the plans have been approved by the school committee and the city council has been notified thereof in such a manner that it may be a matter of final record. *Simpson* v. *Marlborough*, 210.

By the provision of the charter of the city of Marlborough, above mentioned, the school committee is given no authority either expressly or by implication to employ an architect to prepare plans and specifications for the erection of a school house. *Ibid.*

MARRIAGE AND DIVORCE.

Evidence in a libel for divorce upon which it was held that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4. *Field* v. *Field*, 256.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life. *Ibid.*

Provisions of an agreement entered into by a husband and wife with a trustee in settlement of a suit in the Probate Court for separate maintenance upon which in a libel for divorce it was held that the contract must be construed as being intended only to settle the husband's legal obligations while the marriage relation existed, and that it did not have divorce in view. *Kerr* v. *Kerr*, 353.

In the above described libel it was held that the power of the Superior Court upon granting the divorce also to make a decree for alimony and for suitable provision for the minor child was not abrogated by the agreement. *Ibid.*

In the above described libel the question, whether the power of the Probate Court to increase the allowance it had decreed to the wife and child if, in circumstances arising after the decree, such sum became inadequate for their maintenance was limited by the contract of the parties with the trustee, not being raised by the record, was not considered. *Kerr* v. *Kerr*, 353.

To what extent a contract of a husband and his wife with a trustee, which purported to provide for alimony to be paid to the wife in the event of a divorce afterwards being procured by her and which was made without the sanction of the court, might affect the power of the court to award alimony in such subsequent divorce suit, was not determined, the contract in question in this case contemplating the relations of the parties only during the continuance of the marriage relation. *Ibid.*

Where at the hearing of a libel for annulment of a marriage on the ground that it was procured by duress and false imprisonment of the libellant while he was under arrest charged with getting the libellee with child the libellant at the close of the evidence asked for a ruling that the marriage be annulled on the ground that he was falsely imprisoned at the moment of marriage, the ruling was refused and the libel was ordered dismissed subject to exceptions by the libellant, it was held that the exceptions must be considered on the basis that the issuable facts were found against the libellant, and that therefore they must be overruled. *Day* v. *Day*, 362

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability;* WORKMEN'S COMPENSATION ACT.

METHUEN.

Circumstances under which this court, while determining that the statute was invalid, held that granting the relief sought in an information in the nature of a quo warranto filed by the Attorney General based upon allegations that the statute was invalid because the requirements of art. 2 of the Amendments to the Constitution were not observed would not be a discreet exercise of judicial power nor in conformity to the general public interest. *Attorney General* v *Methuen*, 564.

A vote of a public meeting in the town hall of Methuen, which was favorable to the enactment of a bill to institute a city government in the town, which it was held was not an application for such action to the General Court by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by art. 2 of the Amendments to the Constitution. *Ibid.*

Proceedings at annual town meetings of the inhabitants of Methuen resulting in an application to the Legislature for a limited town meeting form of government and the enactment of Spec. St. 1916, c. 116, which was duly accepted by the town, which it was held did not fulfil the requirements of art. 2 of the Amendments to the Constitution, so that a contention to the

effect that the form of town government was so changed that a further change by the enactment of Spec. St. 1917, c. 289, without observance of the requirements of art. 2 of the Amendments to the Constitution, was valid, had no relevancy. *Attorney General* v. *Methuen*, 564.

MINERAL LANDS.

Evidence in an action of contract or tort between two mining corporations not incorporated in this Commonwealth for the conversion of ore from veins, lodes and ledges which had their apexes within the plaintiff's surface boundaries in Arizona and for money had and received from its sale upon which it was held that the record presented a cause arising out of a *bona fide* dispute as to the title to real estate, where the primary question involved was the title. *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.* 185.

In the above described action it was held that the courts of this Commonwealth will not take jurisdiction of such an action, it being one local to the State of Arizona. *Ibid.*

In the same action it was held that such a determination violates no constitutional right of the plaintiff given either by art. 14 of the Amendments to the Federal Constitution, or by art. 4, § 2, of that Constitution. *Ibid.*

The courts of this Commonwealth will not take jurisdiction of an action of contract under §§ 4047, 4048 and 4051 of the Rev. Sts. of the State of Arizona (1913), between the owners of adjacent mines in that State, to compel the payment of a proportionate part of the expense of pumping water from the defendant's mine, such action being local in its character. *Ibid.*

MINOR.

See INFANT.

MISTAKE.

Suit in equity to correct mistake in instrument in writing, see appropriate subtitle under EQUITY JURISDICTION.

MORTGAGE.

Of Real Estate.

Payment; discharge.

Where the plaintiff in a pending suit in equity against his copartners gave the attorney representing him in the suit a mortgage of his interest in certain real estate, which was partnership property and was described in the bill in equity as such to secure the payment of a note, given by him to his counsel for services rendered and to be rendered in the suit it was held, that as counsel for the plaintiff, the mortgagee had actual nctice of the pendency of the proceedings. *Steele* v. *Estabrook*, 252.

In the suit above described it was held that the mortgage was not valid against the defendants. *Ibid.*

In the suit above described it was held that a decree should be entered directing the discharge of the mortgage. *Ibid.*

Mortgage (*continued*).

Where a judge, who heard a "supplemental bill" to discharge the mortgage above described, reported the case to this court for determination and it did not appear from the report that the value of the mortgagee's services as counsel was determined it was held that, under the circumstances, a provision for the payment to him, instead of to the plaintiff, of a sum which the final decree in the main suit had directed to be paid by the defendants to the plaintiff should not be included in the decree. *Steele* v. *Estabrook*, 252.

Foreclosure.

A foreclosure of a mortgage of real estate by entry under R. L. c. 187, § 1, is not effectual if no memorandum is made upon the mortgage deed and the certificate, required by § 2 of the statute to be recorded within thirty days after the entry, was not recorded until thirty-two days after the entry. *Fitchburg Co-operative Bank* v. *Normandin*, 332.

If, after a mortgagee of real estate who has made an ineffectual foreclosure of the mortgage by entry, later makes another entry and sells the property at foreclosure sale for an amount which, with the rents and profits received since the first entry, was insufficient to satisfy the mortgage note, he may maintain an action for the balance still due upon the note, the first entry and possession for three years thereafter not operating to discharge the note. *Ibid.*

Evidence in a suit in equity by one of three sons of a woman who had died intestate seised of certain real estate, against the wife of the plaintiff's father by a second marriage and a bank to which his mother had mortgaged the real estate to secure the payment of a note of $3,500, to have a sale and conveyance of the property to the second wife of the father in foreclosure under a power of sale in the mortgage set aside as having been procured by fraud upon which it was held that it was a reasonable inference that the letters conveying to the plaintiff notice of the impending sale were received by him. *Porter* v. *Porter*, 422.

In the above described suit it was held that the findings of the master and reasonable inferences to be drawn therefrom did not warrant a finding of collusion and lack of good faith on the part of the defendants. *Ibid.*

In the above described suit it was held that the mere fact, that the property brought less than its value, did not invalidate the sale. *Ibid.*

Evidence in a suit in equity, begun in May, 1907, to have a foreclosure of a second mortgage upon real estate of the plaintiff declared invalid, the plaintiff given a right to redeem, and "that the plaintiff may be awarded damages . . . for the injuries done her by the defendant," upon which it was held that the plaintiff was not entitled to a decree awarding her both redemption from the second mortgage and damages because of its wrongful foreclosure. *O'Brien* v. *Logan*, 507.

In the suit above described it was held that the foreclosure of the first mortgage did not give the plaintiff a right to abandon the remedy which she previously had elected to pursue and to have relief by damages. *Ibid.*

Redemption.

Evidence in a suit in equity, begun in May, 1907, to have a foreclosure of a second mortgage upon real estate of the plaintiff declared invalid, the plaintiff given a right to redeem, and "that the plaintiff may be awarded

damages . . . for the injuries done her by the defendant," upon which it was held that the plaintiff was not entitled to a decree awarding her both redemption from the second mortgage and damages because of its wrongful foreclosure. *O'Brien* v. *Logan*, 507.

In the suit above described it was held that the plaintiff had elected to waive damages and rely on her right to redemption. *Ibid.*

In the suit above described it was held that the foreclosure of the first mortgage did not give the plaintiff a right to abandon the remedy which she previously had elected to pursue and to have relief by damages. *Ibid.*

Of Personal Property.

Evidence in an action of replevin to recover a motor truck, a conditional bill of sale of which was assigned as collateral security to the plaintiff by the vendor who thereafter upon the death of the vendee and without the knowledge of the plaintiff sold the truck to the defendant, upon which it was held that the assignment to the plaintiff by the vendor, being given as security for the payment of a debt, was subject to the provisions of St. 1915, c. 226, and, not having been recorded, was not valid against the defendant. *Worcester Morris Plan Co.* v. *Mader*, 435.

In the above described action it was held that judgment must be entered for the defendant. *Ibid.*

In the above described action it was held that the assignment to the plaintiff by the vendor, being given as security for the payment of a debt, was subject to the provisions of St. 1915, c. 226, and, not having been recorded, was not valid against the defendant. *Ibid.*

It also was held in the above described action that under the conditional bill of sale the general ownership of the truck remained in the vendor, who could sell or mortgage his interest therein. *Ibid.*

MOTOR VEHICLE.

Registration.

Evidence at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car upon which it was held that the act of the plaintiff's intestate in attempting to crank the truck was not operating it nor participating in its operation, and that the plaintiff therefore was not precluded from recovering by reason of the use of improper number plates. *Labrecque* v. *Donham*, 10.

Insurance.

See INSURANCE, FIRE.

Negligent Operation.

Cases involving questions of negligent operation of motor vehicles, see appropriate subtitle under NEGLIGENCE.

MUNICIPAL CORPORATIONS.

Validity of Charter.

In quo warranto proceedings brought by the Attorney General in behalf of the Commonwealth to test the question whether the franchises and prerogatives of a municipal corporation have been usurped in which it is alleged that a statute incorporating a town as a city was invalid because contrary to art. 2 of the Amendments to the Constitution, the municipality nominally and in fact exercising the franchises and prerogatives alleged to have been usurped may be made the party defendant. *Attorney General* v. *Methuen*, 564.

Prerequisites for jurisdiction of the General Court under art. 2 of the Amendments to the Constitution to constitute a city government in a town. *Ibid.*

Subsequent approval or ratification by a town, at a meeting "duly warned and holden," of action of the General Court purporting to constitute it a city without the making of the precedent application in accordance with the request or consent of the voters required by art. 2 of the Amendments to the Constitution will not validate such action. *Ibid.*

Proceedings at annual town meetings of the inhabitants of Methuen resulting in an application to the Legislature for a limited town meeting form of government and the enactment of Spec. St. 1916, c. 116, which was duly accepted by the town, which it was held did not fulfil the requirements of art. 2 of the Amendments to the Constitution, so that a contention to the effect that the form of town government was so changed that a further change by the enactment of Spec. St. 1917, c. 289, without observance of the requirements of art. 2 of the Amendments to the Constitution, was valid, had no relevancy. *Ibid.*

A vote of a public meeting in the town hall of Methuen, which was favorable to the enactment of a bill to institute a city government in the town, which it was held was not an application for such action to the General Court by a majority of the inhabitants of the town present and voting "at a meeting duly warned and holden for that purpose" as required by art. 2 of the Amendments to the Constitution. *Ibid.*

Where in an information in the nature of a quo warranto, it was alleged that the proceeding was brought by the Attorney General "in behalf of the Commonwealth and at the relation of" an individual citizen and the prayer was in the form, "Wherefore, the Attorney General upon relation of" the citizen "as aforesaid, prays . . ." and the informant's brief before this court was signed by the Attorney General and by one of his assistants and also by counsel for the relator and the only oral argument in behalf of the informant in this court was made by counsel for the relator, it was held that the validity of a city charter cannot be assailed in the form of proceedings described above by one who has only the standing of a private citizen. *Ibid.*

Circumstances under which this court, while determining that the statute was invalid, held that granting the relief sought in an information in the nature of a quo warranto filed by the Attorney General based upon allegations that the statute was invalid because the requirements of art. 2 of the Amendments to the Constitution were not observed would not be a dis-

creet exercise of judicial power nor in conformity to the general public interest. *Attorney General* v. *Methuen*, 564.

Officers and Agents.

Where a claim of a municipal officer to compensation for his services is based, not merely on a statutory provision but also upon an enforceable obligation of the corporation, although that obligation is one entered into under statutory authority or direction, such claim in legal effect is upon an express contract and an amount so due may be attached in an action by trustee process against the officer as defendant and the municipality as trustee. Walker *v.* Cook, 129 Mass. 577, distinguished. *Hooker* v. *McLennan*, 117.

A bill in equity under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, cannot be maintained to reach and apply, in payment of a debt due to the plaintiff from the principal defendant, salary due to that defendant as first assistant assessor of taxes of the city of Boston, such salary being attachable by trustee process. *Ibid.*

Officers of a city or of a town have only such powers to bind their municipality by contract as are conferred by the express provision of a statute or by necessary implications therefrom. *Simpson* v. *Marlborough*, 210.

The mere fact, that a city received benefit from services rendered to it by an architect, does not render the city liable to pay for such services if it appears that they were rendered at the request of, and under an agreement purporting to have been made in its behalf by, persons acting without authority conferred by express provisions of a statute or by necessary implication from such provisions. *Ibid.*

A provision of the charter of the city of Marlborough which it was held vests in the city council the authority and duty to authorize the erection of school houses subject to the limitation that no final action can be taken until the plans have been approved by the school committee and the city council has been notified thereof in such a manner that it may be made a matter of final record. *Ibid.*

By the provision of the charter of the city of Marlborough, above mentioned, the school committee is given no authority either expressly or by implication to employ an architect to prepare plans and specifications for the erection of a school house. *Ibid.*

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

Evidence at the trial of two actions of tort under R. L. c. 51, § 17, by an administrator respectively against a street railway company and the county of Essex, for causing the death of the plaintiff's intestate at a draw in Plum Island bridge, upon which it was held, that the county of Essex could not be held liable for negligence of the draw tender. *Braley* v. *Massachusetts Northeastern Street Railway*, 275.

City Council.

Where land had been taken by the city of Lowell by right of eminent domain and the owner had brought a petition for a jury for the assessment of his damages and had received, as payment *pro tanto* and without prejudice, a sum of $19,650 which the council previously had awarded on his claim, a vote of the city council, while the action of the landowner was pending, to pay to him the further sum of $2,772.51 "in settlement of" the cause of action, although it recites that it is a vote "of urgent necessity for the immediate preservation of the public peace, health and safety," is not such a vote and, if it is passed without having been proposed in writing and without a notice of it having been published in a newspaper of the city not less than one week before its passage, it is void under § 27 of the charter of the city of Lowell, St. 1911, c. 645. *Merrill* v. *Lowell*, 463.

Whether the requirement of St. 1911, c. 645, § 27, that a vote of the city council of Lowell upon such a matter as above described shall contain a statement of its urgency is satisfied by a mere statement, "This vote is of urgent necessity for the immediate preservation of the public peace, health and safety," without mentioning the particular facts constituting the emergency, was not determined. *Ibid.*

The requirement of § 27 of the charter of the city of Lowell, St. 1911, c. 645, that a vote of the city council of five members, appropriating money in excess of $500 or authorizing a contract involving liability in excess of $500 in a matter for the immediate preservation of the public peace, health or safety, to be valid must be passed by a four fifths vote, is not satisfied by a unanimous vote at a meeting of the council when only three members were present. *Ibid.*

Emergency Appropriation.

Where land had been taken by the city of Lowell by right of eminent domain and the owner had brought a petition for a jury for the assessment of his damages and had received, as payment *pro tanto* and without prejudice, a sum of $19,650 which the council previously had awarded on his claim, a vote of the city council, while the action of the landowner was pending, to pay to him the further sum of $2,772.51 "in settlement of" the cause of action, although it recites that it is a vote "of urgent necessity for the immediate preservation of the public peace, health and safety," is not such a vote and, if it is passed without having been proposed in writing and without a notice of it having been published in a newspaper of the city not less than one week before its passage, it is void under § 27 of the charter of the city of Lowell, St. 1911, c. 645. *Merrill* v. *Lowell*, 463.

Whether the requirement of St. 1911, c. 645, § 27, that a vote of the city council of Lowell upon such a matter as above described shall contain a statement of its urgency is satisfied by a mere statement, "This vote is of urgent necessity for the immediate preservation of the public peace, health and safety," without mentioning the particular facts constituting the emergency, was not determined. *Ibid.*

The requirement of § 27 of the charter of the city of Lowell, St. 1911, c 645, that a vote of the city council of five members, appropriating money in excess of $500 or authorizing a contract involving liability in excess of $500

in a matter for the immediate preservation of the public peace, health or safety, to be valid must be passed by a four fifths vote, is not satisfied by a unanimous vote at a meeting of the council when only three members were present. *Merrill* v. *Lowell*, 463.

Drainage.

A suit in equity cannot be maintained to enjoin a city from draining water by a twelve inch pipe from a public way and through an artificial open ditch across land of a third person and land of the plaintiff to a six inch pipe under a private way which discharged beyond the plaintiff's land, although the result of such method of draining is to cause water to overflow upon the plaintiff's land, where the ditch was dug many years after the twelve inch pipe was laid and it does not appear that the city caused it to be dug or the six inch pipe to be laid or ever maintained or recognized either as a means of drainage or otherwise. *Blair* v. *Brockton*, 512.

Liability for Interest.

Provisions in a contract under which it was held that an action of contract for money had and received cannot be maintained against a municipal corporation for three per cent of an amount of money which, after it had become due to the plaintiff as the general contractor for the building of a school house, the defendant during the pendency of litigation begun by subcontractors under St. 1909, c. 514, § 23, had held on deposit in a bank account containing its general funds, receiving three per cent interest on the entire fund. *Goldman* v. *Worcester*, 319.

Liability in Tort.

Neither an action for malicious prosecution nor an action for abuse of process nor an action for causing the plaintiff, through a conspiracy and by unlawful means, to leave a town, can be maintained against the town although such unlawful acts were done by persons who were officers, servants and agents of the town and the town has adopted a vote purporting to authorize them to do the unlawful acts in its behalf or a vote purporting to ratify such acts after they were done, the town having no power to commit such acts and the votes therefore being wholly illegal and without effect. *Brown* v. *Edgartown*, 258.

Defects in Ways.

Liability of municipalities for defects in highways, see appropriate subtitle under WAY.

NAME.

A person's name is the distinctive characterization in words by which he is known and is distinguished from others. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

TRADE NAME, see that title.

NEGLIGENCE.

Plaintiff's Due Care: Contributory Negligence.

Evidence in an action against a street railway company for personal injuries received in a collision of a motor car, which the plaintiff was driving, with an electric street car of the defendant, upon which it was held that it could not be said as a matter of law that the plaintiff was negligent. *Clayton* v. *Holyoke Street Railway*, 359.

Testimony, at the trial of actions for causing the death of a boy who seized a wire running from an electric transformer and was killed by reason of the high voltage of the electricity, of a companion of the boy who was killed, "I told him [immediately before the accident] not to touch it [the wires] and he said he was not afraid," was held to have been competent to prove that the plaintiff's intestate was aware of the danger of his action and was not in the exercise of due care when he was killed. *Robbins* v. *Athol Gas & Electric Co.* 387.

Evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff was run into by an open electric car of the defendant in a street in a city at about nine o'clock in an evening in July upon which it was held that it could not be ruled as a matter of law that the plaintiff was negligent. *Gerhart* v. *Holyoke Street Railway*, 392.

Evidence at the trial of an action by a girl against the operator of a motor car for personal injuries received by the plaintiff when eleven years of age and caused by her being run into by the motor car at about noon on a public way twenty-five feet wide, which she was crossing upon which it was held that a finding was warranted that the plaintiff was in the exercise of due care. *Inangelo* v. *Petterson*, 439.

Evidence at the trial of an action of tort for personal injuries received after St. 1914, c. 553, was in effect by a workman, who at fifteen minutes before eight on a morning in February was repairing a spring switch in a street railway track on an ordinarily much travelled city street forty feet wide, and while so at work was run into by a motor truck of the defendant negligently driven upon which it was held that it could not be ruled as a matter of law that negligence of the plaintiff contributed to his injury. *Dube* v. *Keogh Storage Co.* 488.

Evidence in an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while a passenger, he was thrown, upon which it was held that findings were warranted that the plaintiff was not guilty of contributory negligence, and that the defendant or its employees were negligent. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

In the above described action where there was evidence tending to show that, shortly before entering the street car, the plaintiff had drunk intoxicating liquor, and the defendant contended that in consequence thereof he became intoxicated and that his fall from the car was the result of such intoxication, it was held that the question, how far, if in any degree, the use of the intoxicating liquor caused the plaintiff's fall or contributed to his injuries, was for the jury. *Ibid.*

Rulings requested by the defendant in the above described action relative to the plaintiff's use of intoxicating liquor as bearing upon his right to recover

which it was held, accurately stated the law and were not unequivocally and positively given in the charge; and the defendant's exceptions to the refusal to give which were sustained. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Due Care of Child.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care exercised by his parents, by the provisions of St. 1914, c. 553. *Ibid.*

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances. *Ibid.*

Evidence upon which it was held that a boy three years and nine months of age, who was injured by collision with a motor vehicle in a highway, must be found not to have been in the exercise of the due care required of an ordinarily prudent adult person under the circumstances, and, where it further appears that he was upon the highway unattended by reason of negligence of his parents, he is precluded from recovery for his injuries. *Ibid.*

Where, in an action of tort for personal injuries, upon a view of the evidence most favorable to the plaintiff, a finding must be made that the plaintiff was negligent, the plaintiff is not aided by the provisions of St. 1914, c. 553, and a verdict should be ordered for the defendant. *Ibid.*

Due Care of Person in Charge of Child.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130

Imputed.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care

exercised by his parents, by the provisions of St. 1914, c. 553. *Sullivan* v. *Chadwick*, 130.

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances. *Ibid.*

Evidence upon which it was held that a boy three years and nine months of age, who was injured by collision with a motor vehicle in a highway, must be found not to have been in the exercise of the due care required of an ordinarily prudent adult person under the circumstances, and, where it further appears that he was upon the highway unattended by reason of negligence of his parents, he is precluded from recovery for his injuries. *Ibid.*

Licensee or Trespasser.

Evidence upon which it was held that in the absence of wilful, wanton and reckless misconduct of the defendant there can be no recovery under St. 1907, c. 375, for the death of a boy who while upon factory premises without invitation of the proprietor seized a wire running from an electric transformer located upon the premises to the factory and was killed by high voltage electricity either in an action against the proprietor of the factory or in an action against an electric company which owned, controlled and maintained the transformers and wires. *Robbins* v. *Athol Gas & Electric Co.* 387.

Invited Person.

The obligation of the landlord of a two-family tenement house to a tenant and his invited guests relating to repair of a piazza used in common by the tenants, where no express agreement on the subject has been made, is that he shall exercise due care to keep the piazza in such condition as, to a person of ordinary observation, it would appear to be in at the time of letting. *Kirby* v. *Tirrell*, 170.

Assumption of Risk.

A corporation, maintaining at a beach resort an amusement device, which in part consists of a slide down which one using it is propelled to a moving belt whence he jumps to the floor, in the absence of any negligence in its construction, condition or operation, is not liable for personal injuries received by one who, having used the device five or six times before so that he is familiar with the manner of its use and the sensation caused thereby, enters it when a large crowd is present and, because of the crowd, is injured when he jumps from the moving belt. *Sullivan* v. *Ridgway Construction Co.* 75.

The decision above described was reached without considering any defence involved in the fact that the injured person was a minor and had entered the device upon a ticket having on its reverse side this language: "No charge is made for the use of Amusement Devices in the Pit or Gymnasium, but persons using same agree to assume all risk of personal injury and loss or damage to property." *Ibid.*

By employee, see *Employer's Liability, post.*

Employer's Liability.

Effect of workmen's compensation act.

Evidence in an action against the proprietor of a store for personal injuries by a woman who was employed as a buyer of millinery under a general contract in writing for a year at a stipulated weekly salary by the proprietor of the store upon which it was held that the injury to the woman arose out of and in the course of her employment and that she was not entitled to maintain an action at common law against the proprietor of the store. *White* v. *E. T. Slattery Co.* 28.

Federal employers' liability act.

Evidence at the trial of an action for personal injuries, brought under the federal employers' liability act against a railroad corporation by a flagman in its employ in interstate commerce who was struck by a backing train, where it appeared that it was the duty of the engineer, before proceeding to back the train, to give a whistle signal, upon which it was held that the jury could have found that, had the whistle sounded, the plaintiff would have heard it. *Howard* v. *New York, New Haven, & Hartford Railroad,* 370.

Evidence in the action above described upon which it was held that the jury could have found that the signal was not given, and that the failure to give it contributed to the plaintiff's injury. *Ibid.*

Evidence in the action above described upon which it was held that the question of the defendant's negligence was for the jury. *Ibid.*

Evidence at the trial above described upon which it was held that the questions, whether the failure to give the signal in accordance with the defendant's rule caused the plaintiff's injury, and whether the plaintiff assumed the risk of his injury in all the circumstances, were for the jury. *Ibid.*

At the trial of the action above described, it was error to permit the plaintiff to testify that one of the defendant's examiners had told him that a train was not to move backwards until a signal was given by the flagman who was protecting it in the rear, and that when he was injured the engineer had backed the train without receiving such a signal, it appearing that there was no such written or printed rule of the defendant and it not appearing that the examiner had authority from the defendant, express or implied, to make such a rule, to give such instructions, or to decide that the printed rules of the defendant should be so construed. *Ibid.*

Evidence in the action above described upon which it was held that it was error to refuse to instruct the jury at the request of the defendant that "the action of the conductor or engineer in causing the train to back without getting a signal from the plaintiff as rear end flagman so to do was not negligence." *Ibid.*

Where at the trial above described the plaintiff testified that there was a practice that no train protected by a flagman should be backed until a signal came from the flagman, but the record showed no evidence tending to prove that this method of transacting its business was known to the defendant or to its officers, nor any evidence from which it could be inferred that it was assented to by them it was held that the defendant was not bound to observe a practice as to the moving of its trains adopted by its employees without its knowledge or acquiescence. *Ibid.*

Street Railway.

Person on highway.

Evidence offered to controvert the testimony of a fellow employee at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car which it was held rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee. *Labrecque* v. *Donham*, 10.

Evidence at the trial of the action above described, tending to show that certain witnesses were intoxicated when the accident happened which it was held should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony. *Ibid.*

Evidence in the above described action upon which it was held that an instruction requested by the defendant, and refused, that if the plaintiff's intestate was intoxicated at the time of the accident and such intoxication contributed to the injury, he could not recover, should have been given. *Ibid.*

In the above described action where the judge left to the jury the question whether the intestate's conduct was the conduct of "an ordinarily prudent man under the circumstances" it was held that the instruction given was open to the interpretation that the circumstances in which the care of the intestate was to be judged included that of voluntary intoxication and therefore that subject was inadequately dealt with in the charge. *Ibid.*

In the same action it was held that this court could not say that the error in instructing the jury as above described did not result in harm to the defendant, and therefore the exceptions should be sustained. *Ibid.*

In the same action it was held that prejudicial error was committed by the trial judge in instructing the jury that the motorman of the street car that ran into the plaintiff's intestate was required to exercise the care of a reasonably prudent man "with his skill" and that he was to be judged by the standard of care that would be reasonably expected from "a prudent man, skilful man, with his experience just as he stood there on the car." *Ibid.*

Evidence at a trial of an action against a street railway company for personal injuries, received in 1917 when a horse drawn wagon which the plaintiff was driving was run into by an electric street car operated by the defendant upon which it was held, that in the absence of other evidence as to the surrounding circumstances, it could not be said as a matter of law that negligence of the plaintiff contributed to cause his injury. *Connolly* v. *Boston Elevated Railway*, 173.

Evidence at the trial of the above described action upon which it was held that findings were warranted that the street car was negligently operated at an excessive speed and without warning signals. *Ibid.*

In the above described action it also was held that no reason appeared for not applying the general rule that, at the trial of an action for personal injuries or property damage due to a collision between an electric street car and a team at intersecting streets, the questions of due care on the part of the plaintiff and of negligence on the part of the motorman are for the jury. *Ibid.*

Evidence at the trial of an action of tort against a street railway company for personal injuries received in a collision of a motor car, which the plaintiff was

driving, with an electric street car of the defendant at the intersection of streets in a thickly settled district of a city upon which it was held that there was evidence of negligence of the defendant's motorman. *Clayton* v. *Holyoke Street Railway*, 359.

Evidence in the above described action upon which it was held that it could not be said as a matter of law that the plaintiff was negligent. *Ibid.*

Evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff was run into by an open electric car of the defendant in a street in a city at about nine o'clock in an evening in July upon which it was held that it could not be ruled as a matter of law that the plaintiff was negligent. *Gerhart* v. *Holyoke Street Railway*, 392.

In the above described action it was held that the question of the motorman's negligence was for the jury. *Ibid.*

Evidence at the trial of an action against a street railway company for personal injuries received by a child three years old, who, when upon a public street unattended by any person on a pleasant October day, was run into by an electric street car operated by the defendant upon which a verdict properly may be ordered for the defendant. *Parsons* v. *Boston Elevated Railway*, 415.

Passenger.

Evidence at the trial of an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while standing in the vestibule, he was thrown upon which it was held that a finding that the plaintiff was a passenger while in the rear vestibule was warranted. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Evidence in an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while a passenger, he was thrown, upon which it was held that findings were warranted that the plaintiff was not guilty of contributory negligence, and that the defendant or its employees were negligent. *Ibid.*

Evidence in the above described case upon which it was held that a verdict for the plaintiff was warranted. *Ibid.*

Where at the trial of an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while a passenger, he was thrown, there was evidence tending to show that, shortly before entering the street car, the plaintiff had drunk intoxicating liquor, and the defendant contended that in consequence thereof he became intoxicated and that his fall from the car was the result of such intoxication, it was held that the question, how far, if in any degree, the use of the intoxicating liquor caused the plaintiff's fall or contributed to his injuries, was for the jury. *Ibid.*

Rulings requested by the defendant in the above described action relative to the plaintiff's use of intoxicating liquor as bearing upon his right to recover which it was held, accurately stated the law and were not unequivocally and positively given in the charge; and the defendant's exceptions to the refusal to give which were sustained. *Ibid.*

If, in the action above described, it was found that the fall of the plaintiff from the street car upon which he was riding was not caused by contributory

negligence on his part, then he did not cease to be a passenger while lying upon the track and the defendant was required in the operation of the second car to use toward him the care it owed to a passenger. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

If voluntary intoxication on the part of the plaintiff in the action above described was found to be the direct and proximate cause of his fall from the car upon which he was a passenger, his rights as a passenger ceased when he fell, and thereafter he had the rights only of a traveller upon the highway. *Ibid.*

At the trial of the action above described, there was no evidence that either the motorman or the conductor of the street car upon which the plaintiff was a passenger had any knowledge of his intoxicated condition, if such condition existed, and it therefore was held, that the decision in Black v. New York, New Haven, & Hartford Railroad, 193 Mass. 448, was not applicable. *Ibid.*

Requests of the defendant for rulings at the trial of the action above described, where the plaintiff contended that the motorman of the second car, which ran over the plaintiff, was guilty of wilful, wanton or reckless conduct, which it was held while the language of the rulings, in speaking of "wilful . . . wanton negligence," was inaccurate, directed the attention of the trial judge to an aspect of the case which called for an instruction that there was no evidence sufficient to support such a contention of the plaintiff, and that it was error not to give appropriate instructions upon the subject. *Ibid.*

A rule of the defendant relating to spacing and speed of cars following one another was held properly to have been admitted at the trial above described, with a sentence at the end, "No excuse will be received for a rear-end collision," omitted; and it also was held that the defendant was not harmed by such omission. *Ibid.*

Even if records of certain alleged rules established by the defendant, in the action above described, governing the conduct of its employees, were destroyed and therefore could not be put in evidence, testimony of a former employee of the defendant describing certain orders and instructions given to him by a claim agent of the defendant was not admissible in the absence of evidence of authority of the claim agent to issue such orders or instructions on behalf of the defendant. *Ibid.*

Elevated Railway.

Evidence at the trial of an action of tort by a woman against a corporation operating an elevated railway for personal injuries alleged to have been received by the plaintiff when a passenger on a car of the defendant by being pushed from the door of the car to a station platform which it was held warranted a finding of negligence of an employee of the defendant. *Moulton* v. *Boston Elevated Railway*, 234.

From the whole charge in the above described action it was held that the jury could not have understood that they could find the defendant to have been at fault simply because the car became crowded after the plaintiff became a passenger. *Ibid.*

The defendant, at the trial above described, also alleged an exception on the ground that the jury were instructed to find for the plaintiff if she was injured only by reason of the crowding of the other passengers, but it was held

that, although some parts of the charge were open to that objection, taking the charge in its entirety, it appeared that the jury were correctly instructed and that there was no reversible error. *Moulton* v. *Boston Elevated Railway*, 234.

Railroad.

It is not negligence on the part of a railroad corporation not to keep windows and doors of passenger cars closed in warm weather in order to exclude cinders. *Shine* v. *New York, New Haven, & Hartford Railroad*, 419.

Evidence at the trial of an action against a railroad corporation for personal injuries sustained by the plaintiff from a foreign substance which blew into his eye, upon which it was held that the doctrine of *res ipsa loquitur* did not apply, and that the evidence would not warrant a finding of negligence on the part of the defendant. *Ibid.*

Motor Vehicle.

Evidence offered to controvert the testimony of a fellow employee at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car which it was held rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee. *Labrecque* v. *Donham*, 10.

Evidence at the trial of the action above described tending to show that certain witnesses were intoxicated when the accident happened which it was held should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony. *Ibid.*

Evidence in the above described action upon which it was held that an instruction requested by the defendant, and refused, that if the plaintiff's intestate was intoxicated at the time of the accident and such intoxication contributed to the injury, he could not recover, should have been given. *Ibid.*

In the above described action where the judge left to the jury the question whether the intestate's conduct was the conduct of "an ordinarily prudent man under the circumstances" it was held that the instruction given was open to the interpretation that the circumstances in which the care of the intestate was to be judged included that of voluntary intoxication and therefore that subject was inadequately dealt with in the charge. *Ibid.*

In the same action it was held that this court could not say that the error in instructing the jury as above described did not result in harm to the defendant, and therefore the exceptions should be sustained. *Ibid.*

In the same action it was held that prejudicial error was committed by the trial judge in instructing the jury that the motorman of the street car that ran into the plaintiff's intestate was required to exercise the care of a reasonably prudent man "with his skill" and that he was to be judged by the standard of care that would be reasonably expected from "a prudent man, skilful man, with his experience just as he stood there on the car." *Ibid.*

Evidence at the trial of an action of tort against a street railway company for

personal injuries received in a collision of a motor car, which the plaintiff was driving, with an electric street car of the defendant at the intersection of streets in a thickly settled district of a city upon which it was held that there was evidence of negligence of the defendant's motorman. *Clayton* v. *Holyoke Street Railway*, 359.

Evidence in the above described action upon which it was held that it could not be said as a matter of law that the plaintiff was negligent. *Ibid.*

Evidence at the trial of an action for personal injuries received when the plaintiff was run into from behind by a motor car driven by the defendant on a country road upon which it was held that the questions, whether the defendant was negligent and whether negligence of the plaintiff contributed to the jury, were for the jury, although the defendant testified that he did not see the plaintiff because he was blinded by lights of an approaching electric car and because the plaintiff's "clothing was very nearly the same color as the road." *Alpert* v. *Ellis*, 404.

Evidence at the trial of an action by a girl against the operator of a motor car for personal injuries received by the plaintiff when eleven years of age and caused by her being run into by the motor car at about noon on a public way twenty-five feet wide, which she was crossing upon which it was held that a finding was warranted that the plaintiff was in the exercise of due care. *Inangelo* v. *Petterson*, 439.

A statement in a hospital record reading as follows: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)," which was offered, at the trial above described, by the defendant it was held properly was excluded, since its admission would have been in direct violation of St. 1905, c. 330, as amended by St. 1912, c. 442. *Ibid.*

Evidence at the trial of an action of tort for personal injuries received after St. 1914, c. 553, was in effect by a workman, who at fifteen minutes before eight on a morning in February was repairing a spring switch in a street railway track on an ordinarily much travelled city street forty feet wide, and while so at work was run into by a motor truck of the defendant negligently driven upon which it was held that it could not be ruled as a matter of law that negligence of the plaintiff contributed to his injury. *Dube* v. *Keogh Storage Co.* 488.

The instructions given in the charge and a supplemental charge to the jury at the trial above described were held properly to have dealt with requests by the defendant for rulings, that "A person who is working in a place which he knows to be dangerous by reason of the traffic or other causes is bound to exercise his own faculties to insure his own safety and his failure to do so is negligence," and that "A person is not justified in relying wholly upon statutory signals which ought to be given by others but is bound to use his eyes and ears reasonably to ascertain whether or not a vehicle is approaching and failure to do so is negligence." *Ibid.*

In Use of Way.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for

himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care exercised by his parents, by the provisions of St. 1914, c. 553. *Ibid.*

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances. *Ibid.*

Evidence upon which it was held that a boy three years and nine months of age, who was injured by collision with a motor vehicle in a highway, must be found not to have been in the exercise of the due care required of an ordinarily prudent adult person under the circumstances, and, where it further appears that he was upon the highway unattended by reason of negligence of his parents, he is precluded from recovery for his injuries. *Ibid.*

Evidence at a trial of an action against a street railway company for personal injuries, received in 1917 when a horse drawn wagon which the plaintiff was driving was run into by an electric street car operated by the defendant upon which it was held, that in the absence of other evidence as to the surrounding circumstances, it could not be said as a matter of law that negligence of the plaintiff contributed to cause his injury. *Connolly* v. *Boston Elevated Railway*, 173.

Evidence at the trial of the above described action upon which it was held that findings were warranted that the street car was negligently operated at an excessive speed and without warning signals. *Ibid.*

In the above described action it also was held that no reason appeared for not applying the general rule that, at the trial of an action for personal injuries or property damage due to a collision between an electric street car and a team at intersecting streets, the questions of due care on the part of the plaintiff and of negligence on the part of the motorman are for the jury. *Ibid.*

Evidence at the trial of an action of tort against a street railway company for personal injuries received in a collision of a motor car, which the plaintiff was driving, with an electric street car of the defendant at the intersection of streets in a thickly settled district of a city upon which it was held that there was evidence of negligence of the defendant's motorman. *Clayton* v. *Holyoke Street Railway*, 359.

Evidence in the above described action upon which it was held that it could not be said as a matter of law that the plaintiff was negligent. *Ibid.*

Evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff was run into by an open electric car of the defendant in a street in a city at about nine o'clock in an evening in July upon which it was held that it could not be ruled as a matter of law that the plaintiff was negligent. *Gerhart* v. *Holyoke Street Railway*, 392.

In the above described action it was held that the question of the motorman's negligence was for the jury. *Ibid.*

Evidence at the trial of an action for personal injuries received when the plaintiff was run into from behind by a motor car driven by the defendant on a country road upon which it was held that the questions, whether the defendant was negligent and whether negligence of the plaintiff contributed to the injury, were for the jury, although the defendant testified that he did not see the plaintiff because he was blinded by lights of an approaching electric car and because the plaintiff's "clothing was very nearly the same color as the road." *Alpert* v. *Ellis*, 404.

Evidence at the trial of an action by a girl against the operator of a motor car for personal injuries received by the plaintiff when eleven years of age and caused by her being run into by the motor car at about noon on a public way twenty-five feet wide, which she was crossing upon which it was held that a finding was warranted that the plaintiff was in the exercise of due care. *Inangelo* v. *Petterson*, 439.

A statement in a hospital record reading as follows: "'Present Illness,' while patient was running along the road four days ago, she was run over by an automobile producing injuries as per local (left leg)," which was offered, at the trial above described, by the defendant it was held properly was excluded, since its admission would have been in direct violation of St. 1905, c. 330, as amended by St. 1912, c. 442. *Ibid.*

Evidence at the trial of an action of tort for personal injuries received after St. 1914, c. 553, was in effect by a workman, who at fifteen minutes before eight on a morning in February was repairing a spring switch in a street railway track on an ordinarily much travelled city street forty feet wide, and while so at work was run into by a motor truck of the defendant negligently driven upon which it was held that it could not be ruled as a matter of law that negligence of the plaintiff contributed to his injury. *Dube* v. *Keogh Storage Co.* 488.

The instructions given in the charge and a supplemental charge to the jury at the trial above described were held properly to have dealt with requests by the defendant for rulings, that "A person who is working in a place which he knows to be dangerous by reason of the traffic or other causes is bound to exercise his own faculties to insure his own safety and his failure to do so is negligence," and that "A person is not justified in relying wholly upon statutory signals which ought to be given by others but is bound to use his eyes and ears reasonably to ascertain whether or not a vehicle is approaching and failure to do so is negligence." *Ibid.*

Of One Controlling Real Estate.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact and is for the jury, and is not one upon which the judge could make final determination. *Coglan* v. *White*, 165.

The obligation of the landlord of a two-family tenement house to a tenant and his invited guests relating to repair of a piazza used in common by the

tenants, where no express agreement on the subject has been made, is that he shall exercise due care to keep the piazza in such condition as, to a person of ordinary observation, it would appear to be in at the time of letting. *Kirby* v. *Tirrell*, 170.

Where, at the trial of an action by a guest of a tenant in a two-family tenement house against the landlord for personal injuries received when a board of a piazza, used in common by the tenants, broke as the plaintiff stepped upon it, there is no evidence to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or at any time before the accident to the plaintiff, it is proper to order a verdict for the defendant. *Ibid.*

Evidence at the trial of the action above described, which it was held, did not warrant a finding that the defective board was not in the same condition as to safety as it appeared to be in at the time of the letting, or a finding that, by exercising ordinary diligence, the defendant could have discovered or remedied the defect before the accident. *Ibid.*

The duty which an owner of land, who maintains upon the land a wall or other structure bordering upon a public way, owes to persons upon the way is to keep such structure in a condition which shall be reasonably safe, having regard to its probable deterioration under exposure to the elements and also to all other attendant conditions which reasonably may be anticipated. *Blanchard* v. *Reynolds*, 596.

Evidence in an action, by a child against the owner of land who maintained a wall thereon bordering upon a public alley, for personal injuries resulting from the wall falling upon the plaintiff, upon which it was held that a finding for the plaintiff was not warranted. *Ibid.*

In the action above described, it was stated that it was unnecessary to determine whether the act of one or more boys climbing on or over the wall was such an efficient intervening cause of the falling of the wall as to make the alleged primary cause too remote. *Ibid.*

In Maintenance of Place of Amusement.

A corporation, maintaining at a beach resort an amusement device, which in part consists of a slide down which one using it is propelled to a moving belt whence he jumps to the floor, in the absence of any negligence in its construction, condition or operation, is not liable for personal injuries received by one who, having used the device five or six times before so that he is familiar with the manner of its use and the sensation caused thereby, enters it when a large crowd is present and, because of the crowd, is injured when he jumps from the moving belt. *Sullivan* v. *Ridgway Construction Co.* 75.

In raising Sunken Lighter.

In an action for services rendered and disbursements made in raising a sunken lighter of the defendant, where the defendant claimed in recoupment damages due to the tearing of planks from the bottom of the lighter by reason of alleged negligence of the plaintiff it was held that the question asked the defendant by his counsel, "What did the tearing off of those planks as they were torn off, in view of the condition of your boat, indicate about the skill or lack of skill of the operation?" was improper and rightly was excluded. *Betts* v. *Rendle*, 441.

Evidence upon which it was held that it was proper, at the trial above described for the judge to refuse a request by the defendant that the rule, "To make out a case of specific negligence on the part of the plaintiff it was not necessary for the defendant to put his hand on the specific act of the plaintiff that caused the damage to his lighter. It was enough for the defendant to prove that the damage must have been caused by one or more of several things." *Betts* v. *Rendle*, 441.

A request by the defendant for a ruling, "If the defendant fails to prove specific negligence on the part of the plaintiff he has a right to fall back on the doctrine of *res ipsa loquitur*," properly was refused at the trial above described, that doctrine having no application to the facts in evidence. *Ibid.*

Snow and Ice.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact and is for the jury, and is not one upon which the judge could make final determination. *Coghlan* v. *White*, 165.

Of Contractor in Elimination of Grade Crossing.

Evidence in an action against a railroad corporation and a contractor, who had made an agreement to save the railroad corporation harmless from certain claims on account of injury, for injuries sustained by falling over a stake placed by the contractor and which the jury found was negligently left unprotected and unlighted, upon which it was held that the contractor, having been notified and given an opportunity to defend the action against the railroad corporation, was concluded as to all questions determined therein which were incident to a right of the railroad corporation to recover upon the agreement of indemnity. *Boston & Maine Railroad* v. *T. Stuart & Son Co.* 98.

In the action above described it was held that the negligence which the jury found caused the injury was negligence which, as between the railroad corporation and the contractor, was negligence solely of the contractor. *Ibid.*

In the action above described it was held that the express language of the contract of indemnity did not require that it should be construed as one indemnifying the railroad corporation against the consequences of its own negligence; and the contract was valid. *Ibid.*

In the action above described it also was held that the contractor must respond in damages to the railroad corporation by reason of the contract to indemnify. *Ibid.*

Causing Death.

Evidence upon which it was held that in the absence of wilful, wanton and reckless misconduct of the defendant there can be no recovery under St. 1907, c. 375, for the death of a boy who while upon factory premises without invitation of the proprietor seized a wire running from an electric

transformer located upon the premises to the factory and was killed by high voltage electricity either in an action against the proprietor of the factory or in an action against an electric company which owned, controlled and maintained the transformer and wires. *Robbins* v. *Athol Gas & Electric Co.* 387.

Evidence at the trial together of the actions above described, upon which it was held that, while in the light of the accident it seems that the apparatus might well have been enclosed or otherwise guarded, the evidence did not warrant a finding that either defendant had been guilty of wilful, wanton or reckless misconduct which had caused the boy's death. *Ibid.*

St. 1907, c. 375, amending R. L. c. 171, § 2, so that the liability, thereby constituted, of a person or corporation for the causing of death by his or its agents or servants is based upon their negligence instead of upon their gross negligence, did not undertake to create a lower standard of duty where a penalty is sought under the statute because the injury results in death from that which exists at common law when the injured person survives. *Ibid.*

Testimony, at the trial of the actions described above of the companion of the boy who was killed, "I told him [immediately before the accident] not to touch it [the wires] and he said he was not afraid," was held to have been competent to prove that the plaintiff's intestate was aware of the danger of his action and was not in the exercise of due care when he was killed. *Ibid.*

Voluntary Intoxication.

Rulings requested by the defendant, in an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car, relative to the plaintiff's use of intoxicating liquor as bearing upon his right to recover which it was held accurately stated the law and were not unequivocally and positively given in the charge; and the defendant's exceptions to the refusal to give which were sustained. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

If voluntary intoxication on the part of the plaintiff in the action above described was found to be the direct and proximate cause of his fall from the car upon which he was a passenger, his rights as a passenger ceased when he fell, and thereafter he had the rights only of a traveller upon the highway. *Ibid.*

At the trial of the action above described, there was no evidence that either the motorman or the conductor of the street car upon which the plaintiff was a passenger had any knowledge of his intoxicated condition, if such condition existed, and it therefore was held, that the decision in Black *v.* New York, New Haven, & Hartford Railroad, 193 Mass. 448, was not applicable. *Ibid.*

Violation of Rule.

Evidence at the trial of an action for personal injuries, brought under the federal employers' liability act against a railroad corporation by a flagman in its employ in interstate commerce who was struck by a backing train, where it appeared that it was the duty of the engineer, before proceeding to back the train, to give a whistle signal, upon which it was held that the

jury could have found that had the whistle sounded, the plaintiff would have heard it. *Howard* v. *New York, New Haven, & Hartford Railroad*, 370.

Evidence in the action above described upon which it was held that the jury could have found that the signal was not given, and that the failure to give it contributed to the plaintiff's injury. *Ibid.*

Evidence in the action above described upon which it was held that the question of the defendant's negligence was for the jury. *Ibid.*

Evidence at the trial above described upon which it was held that the questions, whether the failure to give the signal in accordance with the defendant's rule caused the plaintiff's injury, and whether the plaintiff assumed the risk of his injury in all the circumstances, were for the jury. *Ibid.*

At the trial of the action above described, it was error to permit the plaintiff to testify that one of the defendant's examiners had told him that a train was not to move backwards until a signal was given by the flagman who was protecting it in the rear, and that when he was injured the engineer had backed the train without receiving such a signal, it appearing that there was no such written or printed rule of the defendant and it not appearing that the examiner had authority from the defendant, express or implied, to make such a rule, to give such instructions, or to decide that the printed rules of the defendant should be so construed. *Ibid.*

Violation of Statute.

Evidence at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car upon which it was held that the act of the plaintiff's intestate in attempting to crank the truck was not operating it nor participating in its operation, and that the plaintiff therefore was not precluded from recovering by reason of the use of improper number plates. *Labrecque* v. *Donham*, 10

Res ipsa loquitur.

Evidence at the trial of an action against a railroad corporation for personal injuries sustained by the plaintiff from a foreign substance which blew into his eye upon which it was held that the doctrine of *res ipsa loquitur* did not apply, and that the evidence would not warrant a finding of negligence on the part of the defendant. *Shine* v. *New York, New Haven, & Hartford Railroad*, 419.

A request by the defendant for a ruling, "If the defendant fails to prove specific negligence on the part of the plaintiff he has a right to fall back on the doctrine of *res ipsa loquitur*," properly was refused at the trial of an action of contract for services and disbursements made in raising a sunken lighter wherein the defendant claimed in recoupment damages alleged to have resulted from negligence of the plaintiff, that doctrine having no application to the facts in evidence. *Betts* v. *Rendle*, 441.

Wilful or Wanton Misconduct.

Evidence in actions against the proprietor of a factory and the owner of an electric transformer for the death of a boy who while upon factory premises without invitation of the proprietor seized a wire running from an electric transformer located upon the premises to the factory and was killed by high voltage electricity which it was held did not warrant a finding that either defendant had been guilty of wilful, wanton or reckless misconduct which had caused the boy's death. *Robbins* v. *Athol Gas & Electric Co.* 387.

Proximate Cause.

Evidence in an action to recover for personal injuries sustained in a collision of a motor vehicle with an electric street car upon which it was held that there was no error in the judge's refusal to instruct the jury that "There is no evidence that the plaintiff's fall in the hospital some eight or nine weeks after the collision was the natural and proximate result of his original injury, and the plaintiff can recover no damages on account of any injury he may have received from his fall." *Clayton* v. *Holyoke Street Railway*, 359.

In an action by a child against the owner of land who maintained a wall thereon bordering upon a public alley for personal injuries resulting from the wall falling upon the plaintiff it was stated that it was unnecessary to determine whether the act of one or more boys climbing on or over the wall was such an efficient intervening cause of the falling of the wall as to make the alleged primary cause too remote. *Blanchard* v. *Reynolds*, 596.

NEW TRIAL.

See that subtitle under PROBATE COURT.

NOTICE.

The Thanksgiving recess, including the last Thursday of the month of November and the Friday immediately following, was said not to be a "vacation" period within the meaning of St. 1914, c. 714, § 2, requiring, before dismissal of a teacher in the public schools, that the teacher shall be given notice by the school committee of its intention "at least thirty days prior to the meeting, exclusive of the customary vacation periods." *Duffey* v. *School Committee of Hopkinton*, 5.

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated. *Coghlan* v. *White*, 165.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact

and is for the jury, and is not one upon which the judge could make final determination. *Coghlan* v. *White*, 165.

One having business relations with a city or a town is bound to take notice of the scope of the authority of those professing to act as its agents. *Simpson* v. *Marlborough*, 210.

Where the plaintiff in a pending suit in equity against his copartners gave the attorney representing him in the suit a mortgage of his interest in certain real estate, which was partnership property and was described in the bill in equity as such to secure the payment of a note, given by him to his counsel for services rendered and to be rendered in the suit it was held, that as counsel for the plaintiff, the mortgagee had actual notice of the pendency of the proceedings. *Steele* v. *Estabrook*, 252.

If a party to an action, who has saved exceptions to rulings at the trial of the action and has filed a bill setting forth his exceptions, fails to give to the adverse party the notice in writing of the filing of the bill required by Rules 52 and 28 of the Superior Court (1915), a motion to dismiss the exceptions on that ground is correct procedure. *Day* v. *McClellan*, 330.

Rules 52 and 28 of the Superior Court (1915), requiring a notice in writing of the filing of a bill of exceptions to be given to the adverse party, is well within the power of that court and a dismissal of exceptions for want of compliance therewith violates no constitutional right of the excepting party. *Ibid.*

The delivery by the party filing a bill of exceptions merely of a copy of the bill to the adverse party is not a compliance with Rules 52 and 28 of the Superior Court (1915) as to the giving of a notice in writing of the filing of the bill. *Ibid.*

A delay of two months and sixteen days after the filing, twenty days after the trial of an action, of a bill of exceptions, in filing a motion to dismiss the exceptions for failure to give the notice in writing required by Rules 52 and 28 of the Superior Court (1915) does not constitute as a matter of law a waiver of rights under those rules. *Ibid.*

NOVATION.

See that subtitle under CONTRACT.

OFFICER.

At the trial of an action of tort against a deputy sheriff for the conversion of onions which he had attached upon a writ in an action against a third party, evidence is not admissible of statements made by that third party, not in the presence of the plaintiff, tending to show that he owned the onions. *Koski* v. *Haskins*, 346.

At the trial of the action above described, testimony of the defendant, called by the plaintiff, that, as deputy sheriff, he had sold the onions six days after the attachment, was admissible. *Ibid.*

At the trial of the action above described evidence of the price at which onions were sold at a sale six days after the attachment was competent as bearing upon the market value of the onions at the time of their attachment. *Ibid.*

Evidence in the action above described of a demand for the onions made upon

the deputy sheriff by the plaintiff's attorney which was held immaterial. *Koski* v. *Haskins*, 346.

In the action above described it was held that testimony of a warehouseman, in whose warehouse the onions, when attached, were stored was admissible, independently of entries in his books, if he kept any, that the plaintiff had made the arrangements with him for the storage of the onions. *Ibid.*

The measure of damages to be awarded to the plaintiff in the action above described was held to be the value of the onions at the time of the attachment. *Ibid.*

OPTION.

Provisions in a contract relating to a purchase and sale of real estate upon which it was held that the contract was not a mere option, but was one of purchase and sale binding both parties. *Morgan* v. *Forbes*, 480.

PARENT AND CHILD.

A boy three years and nine months of age must be presumed as a matter of law not to possess sufficient discretion to exercise due care of himself; and if his parents permit him to leave home unattended and to look out for himself for two or three hours, during which time he is injured by being run into by a motor car, they must as a matter of law be found to have been negligent. *Sullivan* v. *Chadwick*, 130.

The child above described, in an action against the driver of the motor car to recover for the injuries so received, is not aided, with respect to the care exercised by his parents, by the provisions of St. 1914, c. 553. *Ibid.*

A child of tender years is not precluded from recovery in an action for personal injuries by reason of the facts that, because of his age, he did not possess sufficient intelligence to exercise due care for his own safety and that, when injured, he was unattended upon a highway by reason of negligence of his parents, if his conduct showed that he was in the exercise of the care required of an ordinarily prudent adult person under the circumstances. *Ibid.*

Evidence upon which it was held that a boy three years and nine months of age, who was injured by collision with a motor vehicle in a highway, must be found not to have been in the exercise of the due care required of an ordinarily prudent adult person under the circumstances, and, where it further appears that he was upon the highway unattended by reason of negligence of his parents, he is precluded from recovery for his injuries. *Ibid.*

Evidence in a proceeding under the workmen's compensation act upon which it was held that illegitimate children living with their mother and putative father at the time of his death were members of his family and entitled to compensation. *Gritta's Case*, 204.

PARTNERSHIP.

Evidence at the hearing by a master of a suit in equity for a partnership accounting, upon which it was held that the master properly might refuse to hold the defendant responsible for neglect to keep proper books of account which would show in what way were disbursed daily receipts received by

the defendant during the period when the plaintiff was not present to take care of his own interests. *Poulette* v. *Chainay*, 602.

PASSENGER.

Evidence at the trial of an action against a street railway company for personal injuries sustained by the plaintiff when he was run over by a street car following one from which, while standing in the vestibule, he was thrown, upon which it was held that a finding that the plaintiff was a passenger while in the rear vestibule was warranted. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

If, in the action above described, it was found that the fall of the plaintiff from the street car upon which he was riding was not caused by contributory negligence on his part, then he did not cease to be a passenger while lying upon the track and the defendant was required in the operation of the second car to use toward him the care it owed to a passenger. *Ibid.*

If voluntary intoxication on the part of the plaintiff in the action above described was found to be the direct and proximate cause of his fall from the car upon which he was a passenger, his rights as a passenger ceased when he fell, and thereafter he had the rights only of a traveller upon the highway. *Ibid.*

Actions for damages and for personal injuries suffered by passengers, see appropriate subtitle under NEGLIGENCE.

PERPETUITIES, RULE AGAINST.

A contract concerning real estate which it was held was void as being in violation of the rule against perpetuities and the rule against restraints on alienation. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

If a suit in equity cannot be maintained to enforce specific performance of a contract creating an equitable interest in land because the contract is in violation of the rule against perpetuities and of the rule against restraints on alienation, neither can such a suit be retained for an assessment of damages resulting from a breach of the contract. *Ibid.*

Provisions in an agreement in the form of an indenture, executed and delivered in 1849, between the owner of the land bounded on the thread of a stream, across which there was a dam built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, upon which, in a petition for the assessment of damages resulting from a taking under statutory authority of the land and dam by a city for the purposes of its water supply it was held that the contract was not in violation of the rule against restraints on alienation or the rule against perpetuities. *Battelle* v. *Worcester*, 395.

PLAN.

As evidence, see appropriate subtitle under EVIDENCE.

PLEADING, CIVIL.

Declaration.

Allegations in a count in a declaration in an action of tort by a woman against a corporation owning and conducting a department store upon which it was held that in legal effect the plaintiff sought to recover for the causing of her arrest unlawfully, and not for the slanderous words used; and that the count did not charge malicious prosecution. *Zinkfein* v. *W. T. Grant Co.* 228.

A declaration in an action by the administrator of the estate of the payee named in an instrument in terms as follows: "On demand after date I promise to pay to the order of Ann Maria Sprague One thousand Dollars with interest at 8% per annum. In case of Mrs. Sprague's decease, the principal to be kept as a fund for the Baptist Society at Westminster, Mass., interest to go to Theodosia Miles Whitman; and in case of her decease, interest to go to said Baptist Society," against the makers need not set forth any consideration for the promises therein contained. *Goodfellow* v. *Farnham*, 453.

Plea in Abatement.

A defence to an action of tort at common law for personal injuries received after July 1, 1912, that at the time of the injuries the plaintiff was in the employ of the defendant who was a subscriber under the workmen's compensation act, St. 1911, c. 751, that at no time had the plaintiff given to the defendant notice under Part I, § 5 of the act that he claimed a right of action at common law to recover damages for personal injuries, and that therefore such right of action at common law was waived, is not matter in abatement, but is a defence in bar of the action. *White* v. *E. T. Slattery Co.* 28.

The question, whether allegations contained in a pleading filed in defence of an action constitute matters in abatement or in bar, is to be decided, not by the form of the pleading, but by the substance of the allegations. *Ibid.*

Description, by RUGG, C. J., of matters which properly may be pleaded in abatement in an action at law. *Ibid.*

Demurrer.

Where a judge under R. L. c. 173, § 105, reported for determination by this court the correctness of an order overruling a demurrer to the declaration in an action of contract, and also, under St. 1917, c. 345, reported the action upon a case stated, the defendant's rights under an appeal from the overruling of his demurrer being reserved, and it appeared that the demurrer should have been sustained but that upon the case stated the plaintiff should recover, this court ordered that the plaintiff should have leave to amend, and that, upon the allowance of an amendment stating a cause of action founded upon the case stated, judgment should be entered for the plaintiff. *Boston & Maine Railroad* v. *T. Stuart & Son Co.* 98.

Answer.

A defence to an action of tort at common law for personal injuries received after July 1, 1912, that at the time of the injuries the plaintiff was in the employ of the defendant who was a subscriber under the workmen's compensation act, St. 1911, c. 751, that at no time had the plaintiff given to the defendant notice under Part I, § 5 of the act that he claimed a right of action at common law to recover damages for personal injuries, and that therefore such right of action at common law was waived, is not matter in abatement, but is a defence in bar of the action. *White* v. *E. T. Slattery Co.* 28.

The question, whether allegations contained in a pleading filed in defence of an action constitute matters in abatement or in bar, is to be decided, not by the form of the pleading, but by the substance of the allegations. *Ibid.*

A partial failure of the consideration for a promissory note, in order to be relied on by the maker under R. L. c. 73, § 45, in defence to an action upon the note by the payee, must be alleged specifically in the answer. *Indiana Flooring Co.* v. *Rudnick*, 90.

PLEADING, CRIMINAL.

Complaint or Indictment.

A general plea of not guilty to an indictment is an admission of its validity and a waiver of all matters in abatement. *Commonwealth* v. *Leventhal*, 516.

Plea and Motions.

A general plea of not guilty to an indictment is an admission of its validity and a waiver of all matters in abatement. *Commonwealth* v. *Leventhal*, 516.

No exception lies to a refusal of a request of a defendant under indictment for leave to withdraw a plea of not guilty and to file a motion to quash the indictment and a plea in abatement grounded on allegations that, when the grand jury were considering the case, other persons than members of the grand jury and witnesses were present when other witnesses were testifying; and the fact that the request to withdraw the plea was made does not alter the rule that all matters in abatement of the indictment were waived by the general plea of not guilty. *Ibid.*

PRACTICE, CIVIL.

Abatement.

A defence to an action of tort at common law for personal injuries received after July 1, 1912, that at the time of the injuries the plaintiff was in the employ of the defendant who was a subscriber under the workmen's compensation act, St. 1911, c. 751, that at no time had the plaintiff given to the defendant notice under Part I, § 5 of the act that he claimed a right of action at common law to recover damages for personal injuries, and that therefore such right of action at common law was waived, is not matter in abatement, but is a defence in bar of the action. *White* v. *E. T. Slattery Co.* 28.

The question, whether allegations contained in a pleading filed in defence of an action constitute matters in abatement or in bar, is to be decided, not by the form of the pleading, but by the substance of the allegations. *White* v. *E. T. Slattery Co.* 28.

Description, by RUGG, C. J., of matters which properly may be pleaded in abatement in an action at law. *Ibid.*

Parties.

The mere fact that, after the entry of a judgment in an action of tort and the issuance of an execution for its enforcement, the judgment creditor by an instrument in writing and under seal assigned to a third person is no defence to an action brought in the name of the judgment creditor upon a recognizance, entered into by the judgment debtor and a surety when, after the assignment was made, the debtor was arrested upon the execution, it being necessary that the recognizance be based on the record of the judgment and it not being necessary for the assignee to bring the action thereon in his own name. *Brazill* v. *Green*, 93.

Amendment.

While, under R. L. c. 173, § 48, it would be permissible by amendment to bring into an action a new party defendant in substitution for the one originally named as defendant, a cause of action not in existence at the time the proceedings were instituted and arising thereafter cannot thus be brought into the case. *Knights* v. *Treasurer & Receiver General*, 336.

If, after a petition for a writ of mandamus, commanding one holding the office of Treasurer and Receiver General of the Commonwealth not to distribute and pay over certain funds has been reserved for determination by this court, the respondent resigns his office, his resignation is accepted and his successor is appointed and qualifies, a plea in abatement then filed by the respondent must be sustained, and a motion by the petitioner to amend the petition by substituting as respondent the original respondent's successor in office must be denied. *Ibid.*

Where, upon an exception to the denial of a motion to amend a bill of exceptions, the record shows merely the motion and its denial, the exception must be overruled. *Porter* v. *Travelers Ins. Co.* 524.

Affidavit of no Defence and Counter Affidavit.

An affidavit of defence, filed in an action of contract by a defendant under St. 1911, c. 305, after the plaintiff has filed an affidavit of no defence, is no part of the pleadings in the action. *Indiana Flooring Co.* v. *Rudnick*, 90.

Election.

A finding in an action of contract, with a declaration in two counts, upon which it was held that an exception to the denial of a motion that the plaintiff be required to elect between the first count and the second count, must be overruled. *New England Coca Cola Bottling Co.* v. *Gallagher Bottle Capping Machinery Co. Inc.* 60.

Where the trial of an action, founded upon contentions by the plaintiff that the defendant wrongfully occupied premises owned by the plaintiff knowing that by so doing he was preventing the plaintiff from making a lease of them, proceeded, by reason of statements by the plaintiff's counsel and statements by the trial judge assented to or treated with silence and without objection by the plaintiff's counsel, as upon a claim for damages resulting from a malicious interference with the contract of letting about to be executed, and a verdict was ordered for the defendant, it is not open to the plaintiff, upon an exception to the ordering of the verdict, to contend in this court that he was entitled to go to the jury on a claim for trespass. *Goldsmith* v. *Traveler Shoe Co.* 111.

Separate Trials of Different Issues.

Circumstances under which, it was stated that it was unnecessary to determine whether separate and distinct trials by jury of several defences in bar could have been had against the objection of a party, or whether in any case they ought to be permitted as matter of discretion; but that in a wise exercise of sound discretion there should have been but one trial involving all issues in bar of the plaintiff's claim. *White* v. *E. T. Slattery Co.* 28.

After the trial of the single issue above described, there was a further trial of the action upon the general issue, at which the trial judge ordered a verdict for the defendant, and the plaintiff alleged exceptions and in determining whether there was evidence warranting the submission to the jury of the special question, "At the time of the accident alleged . . . was she [the plaintiff] an employee of the defendant?" the facts and evidence described in the plaintiff's bill of exceptions saved at the trial of the general issue, as well as those described in the defendant's bill of exceptions saved at the trial of the special issue, were taken into consideration. *Ibid.*

Case stated.

While, ordinarily, the only question open upon a report of an action at law under St. 1917, c. 345, upon a case stated without any decision being made is, whether the plaintiff can recover in any form of action, the judge in such a report by agreement of the parties may reserve the rights of the defendant upon its appeal, previously taken, from an order overruling a demurrer to the declaration. *Boston & Maine Railroad* v. *T. Stuart & Son Co.* 98.

Where a judge under R. L. c. 173, § 105, reported for determination by this court the correctness of an order overruling a demurrer to the declaration in an action of contract, and also, under St. 1917, c. 345, reported the action upon a case stated, the defendant's rights under an appeal from the overruling of his demurrer being reserved, and it appeared that the demurrer should have been sustained but that upon the case stated the plaintiff should recover, this court ordered that the plaintiff should have leave to amend, and that, upon the allowance of an amendment stating a cause of action founded upon the case stated, judgment should be entered for the plaintiff. *Ibid.*

Expunging Scandalous and Impertinent Matter from Record.

Certain impertinent and scandalous matter, appended to a record filed in this court after the certificate of the clerk of the court, was ordered expunged. *De Propper, petitioner*, 500.

Auditor's Report.

Where an action is heard upon an auditor's report, and upon other evidence which does not contradict nor affect the findings of the auditor, the report is *prima facie* evidence and requires a judgment in accordance with its findings of fact unless, upon all the facts found, both primary and subsidiary, the report is reasonably susceptible of more than one inference. *Barrell* v. *Paine*, 157.

In an action under R. L. c. 99, § 4, for cash paid and securities delivered by the plaintiff to the defendant a stockbroker, which was heard upon the auditor's report and a stipulation as to certain evidence which was before the auditor it was held that in the circumstances and in the absence of a report of the entire evidence before the auditor, the auditor's conclusion of fact, that the plaintiff did not at any time intend that there should not be actual purchases or sales by the defendant, must stand because it was not as a matter of law inconsistent with other facts found by him. *Adams* v. *Hayden*, 454.

Issues for Jury.

In an action of tort for personal injuries, where the defendant filed a pleading entitled "Motion and Plea," which contained the allegations above described, and claimed a trial by jury upon that issue, and at that trial the judge submitted to the jury one issue only, "At the time of the accident alleged . . . was she [the plaintiff] an employee of the defendant?" the jury answered, "She was not," and the defendant alleged exceptions it was held that, the matter set out in the alleged "Motion and Plea" being in bar and not in abatement, the trial must be treated as a trial of a single issue in bar. *White* v. *E. T. Slattery Co.* 28.

Circumstances under which it was stated that it was unnecessary to determine whether separate and distinct trials by jury of several defences in bar could have been had against the objection of a party, or whether in any case they ought to be permitted as matter of discretion; but that in a wise exercise of sound discretion there should have been but one trial involving all issues in bar of the plaintiff's claim. *Ibid.*

After the trial of the single issue above described, there was a further trial of the action upon the general issue, at which the trial judge ordered a verdict for the defendant, and the plaintiff alleged exceptions and in determining whether there was evidence warranting the submission to the jury of the special question, "At the time of the accident alleged . . . was she [the plaintiff] an employee of the defendant?" the facts and evidence described in the plaintiff's bill of exceptions saved at the trial of the general issue, as well as those described in the defendant's bill of exceptions saved at the trial of the special issue, were taken into consideration. *Ibid.*

Rules of Court.

Rule 28 (1915) of the Superior Court. *Day* v. *McClellan*, 330.
Rule 52 (1915) of the Superior Court. *Day* v. *McClellan*, 330.

Conduct of Trial.

Rebuttal.

Self-serving statements made by the plaintiff in rebuttal which it was held although the order in which evidence shall be introduced at a trial is wholly within the discretion of the trial judge, should have been excluded. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Argument of counsel.

An instruction to a jury which cured an error in the improper admission in evidence at a trial of a statement by the plaintiff's counsel to the jury, "it is my honest opinion that this is a trumped up defence." *Betts* v. *Rendle*, 441.

Rulings and instructions.

At the trial of an action against the receiver of a street railway company for causing personal injuries and death of an employee of the driver of a motor truck, where there was evidence tending to show that, within three hours previous to the accident, the plaintiff's intestate had been drinking intoxicating liquor, and the defendant asked that the jury be instructed that, if the plaintiff's intestate was intoxicated at the time of the accident and such intoxication contributed to the injury, he could not recover, the judge refused so to instruct the jury, but did leave to them the question whether the intestate's conduct was the conduct of "an ordinarily prudent man under the circumstances," the jury found for the plaintiff and the defendant alleged exceptions and it was held that the instruction asked for should have been given. *Labrecque* v. *Donham*, 10.

In the above described action it also was held that the instruction given was open to the interpretation that the circumstances in which the care of the intestate was to be judged included that of voluntary intoxication and therefore that subject was inadequately dealt with in the charge. *Ibid.*

An exception to a refusal by a judge, hearing an action at law without a jury, to grant a request for a ruling must be overruled if the ruling is not applicable to facts warrantably found by the judge. *New England Coca Cola Bottling Co.* v. *Gallagher Bottle Capping Machinery Co. Inc.* 60.

Where, in an action upon a promissory note by the payee against the maker, the answer contains no specific allegation of a partial failure of consideration, the judge properly may refuse to instruct the jury that, "If from the evidence you find that the notes were given in accordance with an agreement for lumber to be delivered in the future, then the burden of proof is upon the plaintiff to show that it actually did send and deliver the lumber of the kind, quality and quantity called for by said agreement," such defence not being open on the pleadings and the burden of establishing such a defence, if properly pleaded, being upon the defendant. *Indiana Flooring Co.* v. *Rudnick*, 90.

In an action of contract for services rendered and disbursements made in raising a sunken lighter, wherein the defendant claimed in recoupment damages alleged to have resulted from negligence of the plaintiff and there was no evidence of error of judgment on the plaintiff's part as distinguished from negligence and no contention was made by the plaintiff that he had com-

mitted an error of judgment, it was held that requests of the defendant, for rulings to the effect that an error of judgment on the plaintiff's part would not relieve him from liability for the damage caused to the defendant properly were refused. *Betts* v. *Rendle*, 441.

Instructions to the jury upon which it was held that a refusal of the judge to rule, at the trial above described, in substance that the plaintiff was entitled to recover, for such services as he rendered, only "what would be a reasonable and customary charge for similar services at the time and place in question," must be overruled. *Ibid.*

Rulings requested by the defendant in the above described action relative to the plaintiff's use of intoxicating liquor as bearing upon his right to recover which it was held, accurately stated the law and were not unequivocally and positively given in the charge; and the defendant's exceptions to the refusal to give which were sustained. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Requests of the defendant for rulings at the trial of the action above described, where the plaintiff contended that the motorman of the second car, which ran over the plaintiff, was guilty of wilful, wanton or reckless conduct which it was held, while the language of the rulings, in speaking of "wilful . . . wanton negligence," was inaccurate, directed the attention of the trial judge to an aspect of the case which called for an instruction that there was no evidence sufficient to support such a contention of the plaintiff, and that it was error not to give appropriate instructions upon the subject. *Ibid.*

Judge's charge.

A charge to the jury, in an action against the receiver of a street railway company for causing personal injuries and death of an employee of the driver of a motor truck, where the defendant contended that the plaintiff was intoxicated when injured, in which it was held that prejudicial error was committed, and that the exceptions thereto must be sustained. *Labrecque* v. *Donham*, 10.

In an action against an elevated railway corporation to recover for injuries sustained by a passenger on one of its cars it was held that the defendant had no ground for complaint of the manner in which a request for an instruction was dealt with, and that there was no error in the instruction given. *Moulton* v. *Boston Elevated Railway*, 234.

From the whole charge in the above described action it was held that the jury could not have understood that they could find the defendant to have been at fault simply because the car became crowded after the plaintiff became a passenger. *Ibid.*

The defendant, at the trial above described, also alleged an exception on the ground that the jury were instructed to find for the plaintiff if she was injured only by reason of the crowding of the other passengers, but it was held that, although some parts of the charge were open to that objection, taking the charge in its entirety, it appeared that the jury were correctly instructed and that there was no reversible error. *Ibid.*

Erroneous statements in a charge of a judge to a jury in an action to recover for personal injuries sustained in a collision of a motor vehicle with an electric street car it was held could not be availed of because not ex-

cepted to at the time of the trial. *Clayton* v. *Holyoke Street Railway*, 359.

The instructions given in the charge and a supplemental charge to the jury at the trial above described were held properly to have dealt with requests by the defendant for rulings, that "A person who is working in a place which he knows to be dangerous by reason of the traffic or other causes is bound to exercise his own faculties to insure his own safety and his failure to do so is negligence," and that "A person is not justified in relying wholly upon statutory signals which ought to be given by others but is bound to use his eyes and ears reasonably to ascertain whether or not a vehicle is approaching and failure to do so is negligence." *Dube* v. *Keogh Storage Co.* 488.

Ordering of Verdict.

Where, in an action of tort for personal injuries, upon a view of the evidence most favorable to the plaintiff, a finding must be made that the plaintiff was negligent, the plaintiff is not aided by the provisions of St. 1914, c. 553, and a verdict should be ordered for the defendant. *Sullivan* v. *Chadwick*, 130.

Where, at the trial of an action by a guest of a tenant in a two-family tenement house against the landlord for personal injuries received when a board of a piazza, used in common by the tenants, broke as the plaintiff stepped upon it, there is no evidence to show what was the condition, apparent or real, of the piazza floor at the time of the letting, or at any time before the accident to the plaintiff, it is proper to order a verdict for the defendant. *Kirby* v. *Tirrell*, 170.

In an action for personal injuries received when the plaintiff was run into from behind by a motor vehicle driven by the defendant on a country road where the defendant testified that he did not see the plaintiff because he was blinded by lights of an approaching electric car and because the plaintiff's "clothing was very nearly the same color as the road" it was held that a motion to direct a verdict for the defendant properly was denied. *Alpert* v. *Ellis*, 404.

Evidence at the trial of an action against a street railway company for personal injuries received by a child three years old, who, when upon a public street unattended by any person on a pleasant October day, was run into by an electric street car operated by the defendant upon which a verdict properly may be ordered for the defendant. *Parsons* v. *Boston Elevated Railway*, 415.

Finding by Judge.

An exception to a finding of fact by a judge, who heard an action at law without a jury, must be overruled if the finding is supported by any foundation in evidence. *New England Coca Cola Bottling Co.* v. *Gallagher Bottle Capping Machinery Co. Inc.* 60.

Findings by a judge, who heard upon affidavits a motion to dismiss a bill of exceptions because the notice in writing of its being filed required by Rules 52 and 28 of the Superior Court (1915) was not given, will not be reversed by this court if warranted by one view of conflicting evidence. *Day* v. *McClellan*, 330.

Where an action of deceit brought by a grantee of certain land against the grantor for an alleged false representation that the land was free from in-

cumbrance was heard by a judge without a jury, who found that the railroad had not abandoned the original location on the land in question and upon an exception by the defendant, the record did not set forth all the evidence, it was held that no error of law appeared in the finding. *Howe* v. *Johnson*, 379.

Findings of an auditor and a stipulation as to certain evidence which was before the auditor upon which it was held in the above described action that the trial judge was warranted in finding for the defendant. *Adams* v. *Hayden*, 454.

Exceptions.

Bill.

While brevity is desirable in a bill of exceptions, the bill must be of such fulness as to present fairly the opinion, ruling, direction or judgment to which exception is saved, with such reference to the evidence, the issues and the course of trial as is adequate to enable this court to understand the questions of law raised and to determine whether the alleged error of law has injuriously affected the substantial rights of the parties. Per RUGG, C. J. *David Rosen, petitioner*, 321.

Allowance and establishment.

Evidence upon which it was held in a petition to establish a bill of exceptions filed by the defendant in an action of contract by a real estate broker against a married woman, the owner of certain real estate, for a commission for procuring a sale of the real estate that the proposed bill of exceptions was not conformable to the truth, and that the petition must be dismissed. *Nielson, petitioner*, 1.

Circumstances occurring at the hearing upon the allowance of a bill of exceptions, upon which it was held that the general rule, that proceedings for the establishment of exceptions are regarded as "*strictissimi juris*," applied with peculiar force. *Rosen, petitioner*, 321.

Evidence upon which it was held that a petition to establish an exception, saved by the defendant at the trial of an action of contract for compensation for services rendered, to a refusal of the trial judge to order a verdict in his favor, must be denied because the bill was not conformable to the truth. *Ibid.*

Expressions in a bill purporting to state an exception, saved by the defendant at the trial, of an action of contract, to a refusal of the trial judge to order a verdict in his favor, which it was held could not fairly be construed to signify that the parties severally introduced evidence tending to prove what the plaintiff was stated to have "claimed" and the defendant to have "contended;" and that, after the disallowance of such a bill, a petition to establish the exception must be dismissed. *Ibid.*

Notice of filing.

If a party to an action, who has saved exceptions to rulings, at the trial of the action and has filed a bill setting forth his exceptions, fails to give to the adverse party the notice in writing of the filing of the bill required by Rules 52 and 28 of the Superior Court (1915), a motion to dismiss the exceptions on that ground is correct procedure. *Day* v. *McClellan*, 330.

Rules 52 and 28 of the Superior Court (1915), requiring a notice in writing of the filing of a bill of exceptions to be given to the adverse party, is well

within the power of that court and a dismissal of exceptions for want of compliance therewith violates no constitutional right of the excepting party. *Day* v. *McClellan*, 330.

Findings by a judge, who heard upon affidavits a motion to dismiss a bill of exceptions because the notice in writing of its being filed required by Rules 52 and 28 of the Superior Court (1915) was not given, will not be reversed by this court if warranted by one view of conflicting evidence. *Ibid.*

The delivery by the party filing a bill of exceptions merely of a copy of the bill to the adverse party is not a compliance with Rules 52 and 28 of the Superior Court (1915) as to the giving of a notice in writing of the filing of the bill. *Ibid.*

A delay of two months and sixteen days after the filing, twenty days after the trial of an action, of a bill of exceptions, in filing a motion to dismiss the exceptions for failure to give the notice in writing required by Rules 52 and 28 of the Superior Court (1915) does not constitute as a matter of law a waiver of rights under those rules. *Ibid.*

Whether error was harmful.

An erroneous instruction by the judge to the jury, in an action against the receiver of a street railway company for causing personal injuries and death of an employee of the driver of a motor truck, where the defendant contended that the plaintiff was intoxicated when injured, which it was held this court could not say did not result in harm to the defendant, and therefore his exceptions should be sustained. *Labrecque* v. *Donham*, 10.

Evidence in an action by a woman against the proprietor of a store for personal injuries where the trial judge at the close of the evidence ordered a verdict for the defendant, and the plaintiff alleged exceptions upon which it was held that the plaintiff was not harmed by that ruling and that the plaintiff's exceptions must be overruled. *White* v. *E. T. Slattery Co.* 28.

A rule of the defendant relating to spacing and speed of cars following one another was held properly to have been admitted at the trial above described, with a sentence at the end, "No excuse will be received for a rear-end collision," omitted; and it also was held that the defendant was not harmed by such omission. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

When exception lies.

An exception to a finding of fact by a judge, who heard an action at law without a jury, must be overruled if the finding is supported by any foundation in evidence. *New England Coca Cola Bottling Co.* v. *Gallagher Bottle Capping Machinery Co. Inc.* 60.

An exception to a refusal by a judge, hearing an action at law without a jury, to grant a request for a ruling must be overruled if the ruling is not applicable to facts warrantably found by the judge. *Ibid.*

A finding in an action of contract, with a declaration in two counts, upon which it was held that an exception to the denial of a motion that the plaintiff be required to elect between the first count and the second count must be overruled. *Ibid.*

An exception to the exclusion of a question put to a witness will not be sustained where it does not appear what answer to the question was expected. *Goldsmith* v. *Traveler Shoe Co.* 111.

An exception to erroneous statements in a charge of a judge in an action to recover for personal injuries sustained in a collision of a motor vehicle with an electric street car which was not made at the trial it was held could not be availed of. *Clayton* v. *Holyoke Street Railway*, 359.

Where at the hearing of a libel for annulment of a marriage on the ground that it was procured by duress and false imprisonment of the libellant while he was under arrest charged with getting the libellee with child the libellant at the close of the evidence asked for a ruling that the marriage be annulled on the ground that he was falsely imprisoned at the moment of marriage, the ruling was refused and the libel was ordered dismissed subject to exceptions by the libellant, it was held that the exceptions must be considered on the basis that the issuable facts were found against the libellant, and that therefore they must be overruled. *Day* v. *Day*, 362.

Where an action of deceit brought by a grantee of certain land against the grantor for an alleged false representation that the land was free from incumbrance was heard by a judge without a jury, who found that the railroad had not abandoned the original location on the land in question and upon an exception by the defendant, the record did not set forth all the evidence, it was held that no error of law appeared in the finding. *Howe* v. *Johnson*, 379.

An exception to the exclusion of a question asked of an expert witness at a trial will not be sustained where it appears that the information sought by the question was given in answer to a later question asked by the judge. *Ibid.*

It is not reversible error to exclude at a trial a question of an expert as to his interpretation of a boundary shown on a plan in evidence. *Ibid.*

An instruction to a jury which cured an error in the improper admission in evidence at a trial of a statement by the plaintiff's counsel to the jury, "it is my honest opinion that this is a trumped up defence." *Betts* v. *Rendle*, 441.

Instructions to the jury upon which it was held that a refusal of the judge to rule, at the trial above described, in substance that the plaintiff was entitled to recover, for such services as he rendered, only "what would be a reasonable and customary charge for similar services at the time and place in question," must be overruled. *Ibid.*

Where, upon an exception to the denial of a motion to amend a bill of exceptions, the record shows merely the motion and its denial, the exception must be overruled. *Porter* v. *Travelers Ins. Co.* 524.

In an action against a street railway for personal injuries exceptions of the defendant were sustained to a refusal to give certain rulings requested by him relative to the plaintiff's use of intoxicating liquor as bearing upon his right to recover. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

An exception saved by the defendant, at the trial of the action above described, to the admission of certain rules of the public service commission requiring wheel guards and fenders on street cars, was overruled, although there was no evidence that the rule had been disobeyed, the judge in his charge having instructed the jury to disregard the evidence. *Ibid.*

Testimony, at the trial above described, in cross-examination of a medical expert called by the defendant, that the witness had been employed by many insurance companies, and, in answer to a question, "You are acting

for an insurance company now?" an answer "Not that I know of," followed by further testimony that he was "working for" the counsel for the defendant, are not grounds for taking the case from the jury and continuing it. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Where, at the hearing by a judge without a jury of an action of contract for damages resulting from failure of the defendant to make several shipments of coal, the judge was asked to rule generally that his finding should be for the defendant and refused the request and found for the plaintiff as to several breaches of the contract, an exception to the refusal of the request must be overruled if a finding for the plaintiff in any amount was warranted, although it appears that the judge's finding as to one of the breaches was erroneous. *Wellington Piano Case Co.* v. *Garfield & Proctor Coal Co.* 544.

Where a general finding for the defendant would not have been warranted by the evidence reported in a bill of exceptions of the defendant in the action above described, which stated that "all the material evidence is included herein" and certain subsidiary findings, which were favorable to the defendant, were unsupported by any evidence and there were no errors of law, excepted to by the defendant, that affected a finding for the plaintiff, it was held that the defendant's exception must be overruled. *Ibid.*

Report.

Where at the trial in the Municipal Court of the City of Boston of an action by a railroad corporation against a consignee of certain cattle for hay furnished the cattle in shipment, the plaintiff objected to the admission of certain evidence and filed a request for a report stating its objections and the rulings of the judge thereon, the judge found for the plaintiff and the plaintiff did not file a draft report and at the request of the defendant the action was reported to the Appellate Division, who dismissed the report, and the defendant appealed, this court, in reversing the order of the Appellate Division dismissing the report of the rulings ordering judgment for the plaintiff, stated that no question arose as to the form of the report, and held that the evidence objected to by the plaintiff properly was admitted, and that judgment should be entered for the defendant. *New York Central Railroad* v. *Sturtevant & Haley Beef & Supply Co.* 16.

Where in an action upon a lease in writing by the lessee against the lessor, for failure to provide heat for the premises it appeared that the lease, while providing that the lessor should provide heat, contained a provision that the lessor should be without liability "for the stopping thereof," the judge granted a motion that a verdict be ordered in favor of the defendant and reported the case to this court for determination "upon the pleadings and upon the written lease, with the agreement of counsel that" this court should "make such disposition of the case as the law and facts warrant" and it did not appear that any offer of proof was made relating to a construction of the provisions of the lease, it was held that it was not open to the plaintiff to contend that he should have been permitted to offer evidence showing what construction the parties to the lease by their conduct had placed upon the provision as to heating. *Kennon* v. *Shepard*, 57.

While, ordinarily, the only question open upon a report of an action at law under St. 1917, c. 345, upon a case stated without any decision being made

is, whether the plaintiff can recover in any form of action, the judge in such a report by agreement of the parties may reserve the rights of the defendant upon its appeal, previously taken, from an order overruling a demurrer to the declaration. *Boston & Maine Railroad* v. *T. Stuart & Son Co.* 98.

Where a judge under R. L. c. 173, § 105, reported for determination by this court the correctness of an order overruling a demurrer to the declaration in an action of contract, and also, under St. 1917, c. 345, reported the action upon a case stated, the defendant's rights under an appeal from the overruling of his demurrer being reserved, and it appeared that the demurrer should have been sustained but that upon the case stated the plaintiff should recover, this court ordered that the plaintiff should have leave to amend, and that, upon the allowance of an amendment stating a cause of action founded upon the case stated, judgment should be entered for the plaintiff. *Ibid.*

A report, by a judge before whom was heard a petition for the assessment of damages, alleged to have been suffered by the proprietor of a general grain, hay and feed business at wholesale and retail and incident to the construction by a city of a sewer upon which it was held that upon the record the petition must be considered as adequate for the giving of appropriate legal relief on the evidence, both because of the terms of the report and because the case had been fully tried. *F. F. Woodward Co.* v. *Fitchburg*, 364.

A report in the above described action upon which it was held that it was not open to the respondent to contend that the petitioner was not entitled to recover at all because the damages were assessed on the basis of loss of business. *Ibid.*

Appeal.

The record upon an appeal from the denial of a petition for the admission or reinstatement of an attorney at law as a member of the bar should include no part of the evidence introduced at the hearing of the petition. *De Propper, petitioner*, 500.

A record, which merely shows a dismissal, after a hearing, of a petition for the admission or reinstatement of an attorney at law as a member of the bar and an appeal therefrom, discloses no error of law. *Ibid.*

Proceedings in Land Court.

See LAND COURT.

Procedure under Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

PRACTICE, CRIMINAL.

Warrant for Arrest.

It is an essential element of a warrant for an arrest in a criminal case that it be directed to some officer or class of officers and not to a department, an organization, or an official or unofficial body. *Graves's Case*, 493.

Abatement.

A general plea of not guilty to an indictment is an admission of its validity and a waiver of all matters in abatement. *Commonwealth* v. *Leventhal*, 516.

No exception lies to a refusal of a request of a defendant under indictment for leave to withdraw a plea of not guilty and to file a motion to quash the indictment and a plea in abatement grounded on allegations that, when the grand jury were considering the case, other persons than members of the grand jury and witnesses were present when other witnesses were testifying; and the fact that the request to withdraw the plea was made does not alter the rule that all matters in abatement of the indictment were waived by the general plea of not guilty. *Ibid.*

Plea.

Article 5 of the Amendments to the Constitution of the United States does not apply to proceedings in the courts of the Commonwealth; and therefore a plea in bar to an indictment must be overruled if the ground of the plea is only that the defendants were lawfully summoned and were required to testify "at the sitting of the Grand Inquest" concerning the matters which were there inquired into and which were the subject matter of the indictment and that by the further prosecution of the indictment the defendants were "deprived of the privileges and immunities guaranteed" in that amendment to the Federal Constitution. *Commonwealth* v. *Leventhal*, 516.

Change of Venue.

No error was found by this court in the denial by a judge of the Superior Court of motions for a continuance and a change of venue of indictments charging the burning and the procuring of the burning of a dwelling house and the procuring of the burning of an insured building with intent to defraud the insurer, offered when the indictment was about to be tried in the county of Suffolk on the ground that certain publications in certain daily newspapers in Boston were prejudicial to the defendants. *Commonwealth* v. *Leventhal*, 516.

Continuance.

No error was found by this court in the denial by a judge of the Superior Court of motions for a continuance and a change of venue of indictments charging the burning and the procuring of the burning of a dwelling house and the procuring of the burning of an insured building with intent to defraud the insurer, offered when the indictment was about to be tried in the county of Suffolk on the ground that certain publications in certain daily newspapers in Boston were prejudicial to the defendants. *Commonwealth* v. *Leventhal*, 516.

Agreed Facts.

Where a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" was tried upon agreed facts it was held that even if the facts agreed upon had warranted a finding that the Jamaica

ginger sold was an intoxicating beverage, that issue, being one of fact, should have been submitted to the jury. *Commonwealth* v. *Sookey*, 448.

Variance.

Where the evidence at the trial of an indictment charging the burning of a "dwelling house of A" tends only to show the burning of a dwelling house owned but not dwelt in by A. there is no variance. *Commonwealth* v. *Leventhal*, 516.

Evidence.

Evidence of previous fires set by two of five defendants in an indictment charging the burning and procuring to be burned of certain buildings was held admissible, under appropriate instructions, at the trial of the indictment, to show the intent of the two defendants, who were implicated in the previous fires, in setting the fires charged in the indictment. *Commonwealth* v. *Leventhal*, 516.

Question for Jury.

Where a complaint under R. L. c. 100, for an unlawful sale of "intoxicating liquor, to-wit, Jamaica Ginger" was tried upon agreed facts it was held that even if the facts agreed upon had warranted a finding that the Jamaica ginger sold was an intoxicating beverage, that issue, being one of fact, should have been submitted to the jury. *Commonwealth* v. *Sookey*, 448.

PRESCRIPTION.

See Adverse Possession.

PROBATE COURT.

Jurisdiction.

Upon a certain petition in the Probate Court under R. L. c. 153, § 33, by a wife against her husband it was held that the Probate Court had jurisdiction and power to enter a decree under § 37 of that chapter, reciting that the parties were living "separately," giving to the petitioner the care and custody of the child and directing the respondent to make certain payments toward the support of the child. *Marshall* v. *Marshall*, 248.

Upon a petition by a banking institution for its appointment as a co-trustee under a will to act with one who alone was named as trustee therein and had appointed and had qualified, it was held that the decree of the Probate Court dismissing the petition must be affirmed, as the appeal sought to raise a question wholly moot, and did not present a question of law proper for this court to determine. *Chase* v. *Russell*, 417.

Motion to Dismiss Appeal for Failure to Prosecute.

A motion for dismissal of an appeal from a decree of the Probate Court under St. 1919, c. 274, § 1, for want of prosecution in failing to prepare and file with the full court of the Supreme Judicial Court the papers required by § 2 of that statute and by R. L. c. 157, § 21, cannot be made before the full court of the Supreme Judicial Court, but should be made in the Probate Court. *Littlejohn* v. *Littlejohn*, 326.

New Trial of Issues by Jury on Appeal.

Where, before proceeding with the trial of issues for a jury framed on an appeal from a decree of the Probate Court allowing a will, the counsel for the executor explained to the trial judge and the appellant's counsel that one of the attesting witnesses was sick but would be able to attend on the next day, and the appellant went forward with the trial, which continued for three days, without insisting that all of the attesting witnesses be called and without making any request for a ruling on the question of the absence of one of those witnesses or saving any exception to his absence, and the issues were determined against him, the appellant is not entitled as a matter of law to have a new trial granted because of the absence of such witness. *McLehose* v. *Reid*, 487.

Exceptions.

An exception to a refusal by a single justice, hearing an appeal from a decree of the Probate Court modifying a final account of an executor by lessening the amount allowed for services and disbursements of counsel, to rule that the amounts charged in the account for such items were not unreasonable, brings to this court no question of law. *Wordell* v. *Grim*, 406.

Decree.

Upon exceptions in a libel for divorce the question whether the power of the Probate Court to increase an allowance which it had decreed to a wife and child in proceedings for separate maintenance, if such sum became inadequate for their maintenance, was limited by a contract of the husband and wife with a trustee for the payment of a certain sum in settlement of the separate maintenance proceedings, not being raised by the record, was not considered. *Kerr* v. *Kerr*, 353.

Appeal.

An appeal from an order, decree or denial of a Probate Court or of a judge of that court under St. 1919, c. 274, §§ 1, 2, is not pending before the full court of the Supreme Judicial Court until the papers specified in R. L. c. 157, § 21, shall have been prepared and filed in that court and the entry fee required by R. L. c. 204, § 6, has been paid. *Littlejohn* v. *Littlejohn*, 326.

A motion for dismissal of an appeal from a decree of the Probate Court under St. 1919, c. 274, § 1, for want of prosecution in failing to prepare and file with the full court of the Supreme Judicial Court the papers required by § 2 of that statute and by R. L. c. 157, § 21, cannot be made before the full court of the Supreme Judicial Court, but should be made in the Probate Court. *Ibid.*

Upon a petition by a banking institution for its appointment as a co-trustee under a will to act with one who alone was named as trustee therein and had been appointed and had qualified, it was held that the decree of the Probate Court dismissing the petition must be affirmed, as the appeal sought to raise a question wholly moot, and did not present a question of law proper for this court to determine. *Chase* v. *Russell*, 417.

PROVINCE LANDS.

St. 1893, c. 470, gave no right based on adverse possession of province land preceding its enactment. *Sklaroff* v. *Commonwealth*, 87.

No title to any of the province lands lying below high water mark could be acquired by adverse possession previous to the enactment of St. 1893, c. 470; and, by reason of the repeal of that statute by R. L. c. 227, in 1902, its provisions did not permit the acquiring of such a title by adverse possession for twenty years preceding its repeal. *Ibid.*

PROXIMATE CAUSE.

Evidence in an action to recover for personal injuries sustained in a collision of a motor vehicle with an electric street car upon which it was held that there was no error in the judge's refusal to instruct the jury that "There is no evidence that the plaintiff's fall in the hospital, some eight or nine weeks after the collision, was the natural and proximate result of his original injury, and the plaintiff can recover no damages on account of any injury he may have received from his fall." *Clayton* v. *Holyoke Street Railway*, 359.

Where, upon a claim by the widow of an employee under the workmen's compensation act, it appears that, while engaged in his employer's regular work, the employee was thrown violently from the seat of a wagon to the hub of a wheel and then to the curbstone, that, at the time when he received the injuries, he was suffering from pulmonary tuberculosis and that the injury, while not causing that disease, hastened its progress or excited it to a fatal termination, a finding is warranted that the employee's death was caused by injuries received in the course of and arising out of his employment. *Glennon's Case*, 542.

In an action by a child against the owner of land who maintained a wall thereon bordering upon a public alley, for personal injuries resulting from the wall falling upon the plaintiff, it was stated that it was unnecessary to determine whether the act of one or more boys climbing on or over the wall was such an efficient intervening cause of the falling of the wall as to make the alleged primary cause too remote. *Blanchard* v. *Reynolds*, 596.

PUBLIC OFFICER.

If, after a petition for a writ of mandamus, commanding one holding the office of Treasurer and Receiver General of the Commonwealth not to distribute and pay over certain funds has been reserved for determination by this court, the respondent resigns his office, his resignation is accepted and his successor is appointed and qualifies, a plea in abatement then filed by the respondent must be sustained, and a motion by the petitioner to amend the petition by substituting as respondent the original respondent's successor in office must be denied. *Knights* v. *Treasurer & Receiver General*, 336.

QUO WARRANTO.

An information in the nature of a quo warranto may be brought by the Attorney General in behalf of the Commonwealth to test the question whether

Quo Warranto (*continued*).

the franchises and prerogatives of a municipal corporation have been usurped. *Attorney General* v. *Methuen*, 564.

In a proceeding of the character above described in which it is alleged that a statute incorporating a town as a city was invalid because contrary to art. 2 of the Amendments to the Constitution, the municipality nominally and in fact exercising the franchises and prerogatives alleged to have been usurped may be made the party defendant. *Ibid.*

The granting of relief in quo warranto proceedings instituted by the Attorney General on behalf of the Commonwealth, even when sought at the instance of the Attorney General in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion. *Ibid.*

Where in an information in the nature of a quo warranto, it was alleged that the proceeding was brought by the Attorney General "in behalf of the Commonwealth and at the relation of" an individual citizen and the prayer was in the form, "Wherefore, the Attorney General upon relation of" the citizen "as aforesaid, prays . . ." and the informant's brief before this court was signed by the Attorney General and by one of his assistants and also by counsel for the relator and the only oral argument in behalf of the informant in this court was made by counsel for the relator, it was held that the permission given to the counsel for the relator to argue in support of the Attorney General's information must not be taken as a precedent. *Ibid.*

The validity of a city charter cannot be assailed in the form of proceeding described above by one who has only the standing of a private citizen. *Ibid.*

An information of the nature above described must be presented by and on behalf of the Commonwealth and by and under the immediate supervision of the Attorney General, and in that way alone. *Ibid.*

In the proceedings above described it was held that if the name of the relator be rejected as surplusage, enough remained in the record to show that the information was filed by the Attorney General in behalf of the Commonwealth. *Ibid.*

Circumstances under which this court, while determining that the statute was invalid, held that granting the relief sought in an information in the nature of a quo warranto filed by the Attorney General based upon allegations that the statute was invalid because the requirements of art. 2 of the Amendments to the Constitution were not observed would not be a discreet exercise of judicial power nor in conformity to the general public interest. *Ibid.*

RAILROAD.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, conferred an authority coextensive with the statute which it amended, which thereafter must be read as if it originally had been in the amended form, and neither the provisions of the amending statute nor those of the statute as amended are restricted to railroad crossings altered after the amendment. *Selectmen of Brookline, petitioners*, 260.

Upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, after their amendment by St. 1908, c. 542, a highway bridge in a town, which had been built over a railroad in accordance with a decree following proceedings under

Pub. Sts. c. 112, §§ 131, 132, ordering that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair," may be ordered to be rebuilt and a part of the expense of such rebuilding may be assessed upon the railroad. *Selectmen of Brookline, petitioners*, 260.

The provisions of St. 1908, c. 552, are not inconsistent with those of St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542. *Ibid.*

A railroad corporation is a creature of the Commonwealth engaged in the doing of a public business and is bound by any reasonable statutes for the regulation of this business which the Legislature chooses to enact. *Ibid.*

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, is not obnoxious to the provisions of either the Federal or the State Constitution. *Ibid.*

A part of the expense of rebuilding a highway bridge over a railroad or of making any structural change or renewal for the purpose of strengthening or improving it upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, may be assessed upon the railroad corporation although it receives no benefit therefrom. *Ibid.*

It could not be ruled as a matter of law, at the trial of an application under St. 1906, c. 463, Part I, § 27, for a revision of a report of a special commission relative to the rebuilding of a highway bridge, previously constructed over a railroad in the town of Brookline, that the railroad corporation received no benefit from such rebuilding, because thereby there was furnished at a crossing over the railroad a bridge more substantial and safe than the previous bridge and thus possible delay and damage which might be incident to a defect in the previous bridge were prevented. *Ibid.*

In the proceedings under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, above described, which were new proceedings, the intent and understanding of the parties to the proceedings under Pub. Sts. c. 112, §§ 131, 132, which resulted in the construction of the original bridge, were held to be immaterial. *Ibid.*

Where, after a decree of county commissioners that a highway bridge over a railroad in a town should be rebuilt, the town carried the decree into effect "by agreement of all parties . . . and . . . paid the charges and expense of rebuilding" previous to a decree in proceedings instituted by it under St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542, the railroad company, at the trial of an application under § 27 of the amended statute for a jury to revise the report of the special commission appointed under the amended §§ 23, 25, is entitled to a ruling that it need not pay to the town interest upon that part of the amount so expended by the town which afterwards was apportioned to be paid by the railroad company. *Ibid.*

Provisions in a decision, plan and decree of a commission for the abolition of a grade crossing in evidence in an action of deceit brought by a grantee of certain land against the grantor for an alleged false representation that the land was free from incumbrance, from which it was held that it could not be implied that the original location of the railroad, which included the northerly portion of the land, was discontinued. *Howe* v. *Johnson*, 379.

Circumstances under which the mere production by the railroad corporation at the hearing before the commission above described, of a plan which did not show the easement of the original location, could not be ruled as matter

of law, at the trial of the action of tort above described to create an estoppel of the railroad corporation at a later time from claiming the existence of such easement. *Howe* v. *Johnson*, 379.

It is a matter of common knowledge that under present conditions a coal burning locomotive cannot draw a train without emitting cinders and smoke. *Shine* v. *New York, New Haven, & Hartford Railroad*, 419.

See also NEGLIGENCE, *Railroad*.

RECOGNIZANCE.

The mere fact that, after the entry of a judgment in an action of tort and the issuance of an execution for its enforcement, the judgment creditor by an instrument in writing and under seal assigned to a third person is no defence to an action brought in the name of the judgment creditor upon a recognizance, entered into by the judgment debtor and a surety when, after the assignment was made, the debtor was arrested upon the execution, it being necessary that the recognizance be based on the record of the judgment and it not being necessary for the assignee to bring the action thereon in his own name. *Brazill* v. *Green*, 93.

Where, at the trial of an action upon a recognizance entered into by a judgment debtor arrested on an execution issued to enforce a judgment in an action of tort, the plaintiff introduced evidence of the judgment, the execution, the return of the officer making the arrest and the certificate of a master in chancery before whom the recognizance was entered into, and rested and no further evidence was admitted, a verdict for the defendants should have been ordered upon their motion, no breach of the recognizance being shown. *Ibid.*

REPLEVIN.

Evidence in an action of replevin to recover a motor truck, a conditional bill of sale of which was assigned as collateral security to the plaintiff by the vendor who thereafter upon the death of the vendee and without the knowledge of the plaintiff sold the truck to the defendant, upon which it was held that under the conditional bill of sale the general ownership of the truck remained in the vendor, who could sell or mortgage his interest therein. *Worcester Morris Plan Co.* v. *Mader*, 435.

In the action above described it was held that the assignment to the plaintiff by the vendor, being given as security for the payment of a debt, was subject to the provisions of St. 1915, c. 226, and, not having been recorded, was not valid against the defendant. *Ibid.*

In the above described action it was held that judgment must be entered for the defendant. *Ibid.*

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

An action of contract for the alleged breach of an employment agreement which it was held was not barred by the acceptance of satisfaction of an execution issuing on a judgment in a previous action between the same

parties and relating to the same agreement. *Dalton* v. *American Ammonia Co.* 105.

The bar of a suit by a judgment of a court of competent jurisdiction in another suit for the same cause of action between the same parties or those in privity with them extends not only to those matters which were pleaded or litigated in the earlier suit but also to those which might have been pleaded or litigated; but, if the later suit is upon a different cause of action, the bar raised by the judgment in the earlier suit is limited to those matters which actually were litigated and determined. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

In a suit in equity in Massachusetts for the specific performance of a certain contract in writing made in 1892 or damages where it appeared that previously the defendant's predecessor in title had obtained a decree in a suit in equity in Vermont restraining the plaintiff's assignor from trespassing upon the land it was held that while the parties in the Massachusetts suit were not the same as those in the Vermont suit, they were their privies so far as concerned the contract of 1892. *Ibid.*

In the above described suit it was held that the causes of action upon which the two suits rested were different. *Ibid.*

In the above described suit it also was held that the judgment in the Vermont suit was conclusive only upon issues therein actually tried and determined. *Ibid.*

In the suit above described it was held that the findings of the chancellor in the Vermont suit as to good faith on the part of the plaintiff there (predecessor of the defendant in the Massachusetts suit) not being pertinent to any issue raised by the pleadings, were not *res judicata* as to any issue raised in the Massachusetts suit. *Ibid.*

In the same suit it was held that the difference in locations of boundaries, as described in the alleged contract of 1892 and in the findings by the chancellor in the Vermont suit and the decree based thereon, were not such as of themselves on their face to justify a ruling on the plea as a matter of law that the contract was unenforceable. *Ibid.*

In the same suit it was held that while the alleged contract of 1892, if it had been presented in the Vermont suit and there found genuine, would have been decisive in favor of the contentions of the defendant there (the predecessor of the plaintiff in the Massachusetts suit) his failure to offer it in evidence at that trial, when it was not in issue on the pleadings, did not as a matter of law prevent his assignee from relying on it in the Massachusetts suit in so far as its obligations were not at variance nor inconsistent with adjudications in the Vermont suit upon issues there actually raised and determined. *Ibid.*

In the same suit it was held that the plea of the defendant setting up the proceedings and the decree in the Vermont suit in bar must be adjudged bad as a matter of law. *Ibid.*

RESTRAINT UPON ALIENATION.

A contract creating an equitable interest in land which it was held that the contract was void as being in violation of the rule against perpetuities and the rule against retraints on alienation. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

If a suit in equity cannot be maintained to enforce specific performance of a contract creating an equitable interest in land because the contract is in violation of the rule against perpetuities and of the rule against restraints on alienation, neither can such a suit be retained for an assessment of damages resulting from a breach of the contract. *Eastman Marble Co.* v. *Vermont Marble Co.* 138.

Provisions in an agreement in the form of an indenture, executed and delivered in 1849, between the owner of land bounded on the thread of a stream, across which there was a dam built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, upon which, in a petition for the assessment of damages resulting from a taking under statutory authority of the land and dam by a city for the purposes of its water supply it was held that the contract was not in violation of the rule against restraints on alienation or the rule against perpetuities. *Battelle* v. *Worcester*, 395.

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

RULES OF COURT.

Rule 28 (1915) of the Superior Court. *Day* v. *McClellan*, 330.
Rule 52 (1915) of the Superior Court. *Day* v. *McClellan*, 330.

SALE.

Validity.

Provisions in a contract relating to a purchase and sale of real estate upon which it was held that the contract was not a mere option, but was one of purchase and sale binding both parties. *Morgan* v. *Forbes*, 480.

Conditional.

Evidence in an action of replevin to recover a motor truck, a conditional bill of sale of which was assigned as collateral security to the plaintiff by the vendor who thereafter upon the death of the vendee and without the knowledge of the plaintiff sold the truck to the defendant, upon which it was held that under the conditional bill of sale the general ownership of the truck remained in the vendor, who could sell or mortgage his interest therein. *Worcester Morris Plan Co.* v. *Mader*, 435.

In the action above described it was held that the assignment to the plaintiff by the vendor, being given as security for the payment of a debt, was subject to the provisions of St. 1915, c. 226, and, not having been recorded, was not valid against the defendant. *Ibid.*

In the above described action it was held that judgment must be entered for the defendant. *Ibid.*

SCHOOL AND SCHOOL COMMITTEE.

The Thanksgiving recess, including the last Thursday of the month of November and the Friday immediately following, was said not to be a "vaca-

tion" period within the meaning of St. 1914, c. 714, § 2, requiring, before dismissal of a teacher in the public schools, that the teacher shall be given notice by the school committee of its intention "at least thirty days prior to the meeting, exclusive of the customary vacation periods." *Duffey* v. *School Committee of Hopkinton*, 5.

Teachers in public schools in towns which compose a superintendency union are protected by the provision of St. 1914, c. 714, § 2, that no teacher within the protection of the statute shall be dismissed "unless . . . the superintendent of schools shall have given to the school committee his recommendations as to the proposed dismissal." *Ibid.*

By R. L. c. 42, § 29, the filing by a teacher in a public school in a city with the auditor or treasurer of the city or with any officer who may be prescribed in its charter, of one copy of a certificate from the school committee of his qualifications is made a condition precedent to his right to demand and receive compensation for his services; and this requirement of the statute cannot be waived either by the mayor or by the city solicitor in an action by the teacher against the city for a balance of salary which had been withheld upon an order of the mayor for a reason other than a failure to file the certificate. *Averell* v. *Newburyport*, 208.

A provision of the charter of the city of Marlborough which it was held vests in the city council the authority and duty to authorize the erection of school houses subject to the limitation that no final action can be taken until the plans have been approved by the school committee and the city council has been notified thereof in such a manner that it may be a matter of final record. *Simpson* v. *Marlborough*, 210.

By the provision of the charter of the city of Marlborough, above mentioned, the school committee is given no authority either expressly or by implication to employ an architect to prepare plans and specifications for the erection of a school house. *Ibid.*

SEWER.

A report, by a judge before whom was heard a petition for the assessment of damages, alleged to have been suffered by the proprietor of a general grain, hay and feed business at wholesale and retail and incident to the construction by a city of a sewer upon which it was held that upon the record the petition must be considered as adequate for the giving of appropriate legal relief on the evidence, both because of the terms of the report and because the case had been fully tried. *F. F. Woodward Co.* v. *Fitchburg*, 364.

The provision as to damages in St. 1912, c. 440, empowering the city of Fitchburg to do the work, previously authorized by St. 1901, c. 354, of constructing, maintaining and operating main drains and common sewers, was intended to enlarge the provision contained in the earlier statute, and entitled a merchant to damages resulting from access to his premises being cut off by work in the construction of a trunk sewer in a public way adjacent thereto, although there was no taking of any of his property. *Ibid.*

A report in the above described action upon which it was held that it was not open to the respondent to contend that the petitioner was not entitled to recover at all because the damages were assessed on the basis of loss of business. *Ibid.*

SLANDER.

See LIBEL AND SLANDER.

SNOW AND ICE.

A return by a constable, upon a notice, directed under Sts. 1908, c. 305; 1913, c. 324, to the owner of certain real estate, of personal injuries caused by ice upon an adjoining sidewalk formed from water discharged by a defective spout attached to a dwelling house on the premises, that he served the notice upon a certain person, "the occupant of Suite 2 of the dwelling house," is *prima facie* evidence of the facts therein stated. *Coghlan* v. *White*, 165.

Where, at the trial of an action for causing personal injuries and death through the negligent maintenance upon a house of a defective water-spout which caused ice to accumulate upon an adjoining sidewalk, the evidence upon the question, whether a constable made service of the notice required by Sts. 1908, c. 305; 1913, c. 324, and whether such service was upon one who then was an occupant of the premises, is conflicting, the question is one of fact and is for the jury, and is not one upon which the judge could make a final determination. *Ibid.*

STATUTE.

St. 1908, c. 542, amending St. 1906, c. 463, Part I, §§ 23, 25, conferred an authority coextensive with the statute which it amended, which thereafter must be read as if it originally had been in the amended form, and neither the provisions of the amending statute nor those of the statute as amended are restricted to railroad crossings altered after the amendment. *Selectmen of Brookline, petitioners*, 260.

Upon proceedings under St. 1906, c. 463, Part I, §§ 23, 25, after their amendment by St. 1908, c. 542, a highway bridge in a town, which had been built over a railroad in accordance with a decree following proceedings under Pub. Sts. c. 112, §§ 131, 132, ordering that the town should bear "all future charges for keeping said bridge and the approaches thereto in repair," may be ordered to be rebuilt and a part of the expense of such rebuilding may be assessed upon the railroad. *Ibid.*

The provisions of St. 1908, c. 552, are not inconsistent with those of St. 1906, c. 463, Part I, §§ 23, 25, as amended by St. 1908, c. 542. *Ibid.*

The amendment to the workmen's compensation act contained in St. 1917, c. 297, abolishing the committee on arbitration and providing in substance that, where parties failed to agree, the Industrial Accident Board might assign the case for hearing by a member of the board, was an amendment relating solely to procedure and not affecting any substantial right of employer, employee or insurer. *Devine's Case*, 588.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 749.

STOCKBROKER.

Findings of an auditor in an action against a stockbroker for money alleged to have been paid in transactions of the character described in R. L. c. 99, § 4, which it was held established the defence, stated in the statute, that actual purchases and sales were made upon the order of the plaintiff, and which findings were not affected by certain further findings of the auditor. *Barrell* v. *Paine*, 157.

A finding of an auditor, to whom was referred an action under R. L. c. 99, § 4, for cash paid and securities delivered by the plaintiff to the defendant, a stockbroker "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold" it was held was, under § 6 of the statute, at most *prima facie* evidence of the apparent intent required by the statute, and did not as a matter of law require a finding of such intent if on all the evidence a contrary finding was warranted. *Adams* v. *Hayden*, 454.

In the action above described which was heard upon the auditor's report and a stipulation as to certain evidence which was before the auditor it was held that in the circumstances and in the absence of a report of the entire evidence before the auditor, the auditor's conclusion of fact, that the plaintiff did not at any time intend that there should not be actual purchases or sales by the defendant, must stand because it was not as a matter of law inconsistent with other facts found by him. *Ibid.*

In the action above described it was held that the statute did not make the defendant liable merely upon his carrying on margin securities which he had purchased for his customer. *Ibid.*

Findings of an auditor and a stipulation as to certain evidence which was before the auditor upon which it was held in the above described action that the trial judge was warranted in finding for the defendant. *Ibid.*

STREET RAILWAY.

Evidence at the trial of two actions of tort under R. L. c. 51, § 17, by an administrator respectively against a street railway company and the county of Essex, for causing the death of the plaintiff's intestate at a draw in Plum Island bridge, upon which it was held, that the street railway company was not liable for the negligence of the draw tender, an employee of the county of Essex. *Braley* v. *Massachusetts Northeastern Street Railway*, 275.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

STRIKE.

A strike of a labor union against a corporation, which is not in violation of any contract between the employer and the employed, is legal if it is caused by a breach of good faith and of square dealing on the part of an officer of the corporation in failing intentionally, without apparent excuse and without notice, to keep an appointment, deliberately made with representatives of the union at a conference touching their contractual relations with each

other, for a further conference at a specified time and place. *Walton Lunch Co.* v. *Kearney*, 310.

Evidence in a suit by the proprietor of a restaurant against members and officers of a labor union which include his employees upon which it was held that a final decree was warranted and proper, which perpetually enjoined and restrained the defendants "from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass and intimidate the plaintiff's customers or intending customers, or his present employees or those desirous of entering his employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract." *Ibid.*

It was stated that, by an appeal from the final decree in the suit above described, questions as to the lawfulness in general of any kind of picketing and as to the interpretation of St. 1913, c. 690, were not raised. *Ibid.*

As applied to a petition for an attachment for contempt in a suit in the Supreme Judicial Court charging that the defendants, members and officers of a labor union, had violated an injunction contained in the final decree in the suit and had committed certain crimes and other acts not criminal in their nature, St. 1911, c. 339, providing that a defendant in a proceeding for contempt, wherein the petition alleges a violation of an injunction which also would be a crime, shall have the right to trial by jury on the issue of fact, whether he committed the acts alleged to constitute the violation, is unconstitutional. *Ibid.*

A strike of workmen which is for the sole object or compelling the employer to re-employ a discharged fellow workman of the strikers is a strike for an unlawful purpose, and it will be enjoined in a suit in equity by the employer against the strikers, even if no illegal means are employed to carry it into effect. *Mechanics Foundry & Machine Co.* v. *Lynch*, 504.

SUPERIOR COURT.

Where, by a writ of error a judgment of the Superior Court is taken to the Supreme Court of the United States and the writ there is dismissed for want of jurisdiction, the Superior Court has no further power over the judgment, which remained in full force and effect, and has no power to grant a motion by the defendant that the judgment be "set aside," or a motion by the plaintiff that it be affirmed, or to order a judgment following the mandate. *Duart* v. *Simmons*, 225.

Evidence in a libel for divorce upon which it was held that the court had no jurisdiction of the libel, because the libellant had not lived in this Commonwealth for the five years last preceding the filing of the libel as required by R. L. c. 152, § 5, and the parties never had lived together as husband and wife in this Commonwealth as required by § 4. *Field* v. *Field*, 256.

The provision of R. L. c. 152, § 4, that, with certain exceptions, a decree of divorce cannot be granted, "if the parties never have lived together as husband and wife in this Commonwealth," means that, with those exceptions, the court has no jurisdiction of a libel for divorce if the parties never have been domiciled in this Commonwealth during their married life. *Ibid.*

Provisions of an agreement entered into by a husband and wife with a trustee in settlement of a suit in the Probate Court for separate maintenance upon

which in a libel for divorce it was held, that the contract must be construed as being intended only to settle the husband's legal obligations while the marriage relation existed, and that it did not have divorce in view. *Kerr* v. *Kerr*, 353.

In the above described libel it was held that the power of the Superior Court upon granting the divorce also to make a decree for alimony and for suitable provision for the minor child was not abrogated by the agreement. *Ibid.*

To what extent a contract of a husband and his wife with a trustee, which purported to provide for alimony to be paid to the wife in the event of a divorce afterwards being procured by her and which was made without the sanction of the court, might affect the power of the court to award alimony in such subsequent divorce suit, was not determined, the contract in question in this case contemplating the relations of the parties only during the continuance of the marriage relation. *Ibid.*

The duty of preparing the copies of papers and the records of cases brought to this court by appeal or upon exceptions, reports or reservations, is placed by R. L. c. 157, § 21; c. 173, § 117, directly, unequivocally and exclusively upon the clerk; and the Superior Court has no jurisdiction or power to order that an appellant be allowed to take the files of a case and to have them printed under his own direction, and to permit printing by multigraph or other duplicating machine. *De Propper, petitioner*, 500.

Where a judge of the Superior Court who heard a demurrer to a bill in equity filed a report to this court in which he stated that he sustained the demurrer, but no formal decree to that effect was entered and a motion by the defendant that the report be discharged for failure of the plaintiff to enter it in this court was allowed a year and a half later and subsequently a motion by the defendant for the entry of a formal decree sustaining the demurrer on the ground that the matter already had been decided by the first judge was allowed by the second judge as of the date of the filing of the report by the first judge, upon an appeal from such decree, where the record did not include a report of evidence, it was held that it was not essential that the motion be decided by the same judge who filed the report. *Reno* v. *Cotter*, 556.

It was held in the same suit that although the report was discharged, it was proper to resort to it for any rightful purpose. *Ibid.*

In the same suit it also was held that the statement in the report by the first judge that he had made an order sustaining the demurrer was a sufficient foundation for the subsequent entry, *nunc pro tunc*, upon the order of the second judge, of an interlocutory decree to that effect. *Ibid.*

SUPREME JUDICIAL COURT.

An appeal from an order, decree or denial of a Probate Court or of a judge of that court under St. 1919, c. 274, §§ 1, 2, is not pending before the full court of the Supreme Judicial Court until the papers specified in R. L. c. 157, § 21, shall have been prepared and filed in that court and the entry fee required by R. L. c. 204, § 6, has been paid. *Littlejohn* v. *Littlejohn*, 326.

A motion for dismissal of an appeal from a decree of the Probate Court under St. 1919, c. 274, § 1, for want of prosecution in failing to prepare and file with the full court of the Supreme Judicial Court the papers required by

§ 2 of that statute and by R. L. c. 157, § 21, cannot be made before the full court of the Supreme Judicial Court, but should be made in the Probate Court. *Littlejohn* v. *Littlejohn*, 326.

Upon a petition by a banking institution for its appointment as a co-trustee under a will to act with one who alone was named as trustee therein and had been appointed and had qualified, it was held that the decree of the Probate Court dismissing the petition must be affirmed, as the appeal sought to raise a question wholly moot, and did not present a question of law proper for this court to determine. *Chase* v. *Russell*, 417.

TAX.

Exemption.

Exemption from taxation of income received from the United States as salary by one who was a vice-president in charge of the operation of a railroad corporation and continued in charge of the operation after the federal government assumed control in 1917. *Biscoe* v. *Tax Commissioner*, 201.

The same exemption applied to income received from the United States as a salary by one who was employed as assistant counsel of a railroad corporation in Massachusetts and who after 1917 continued to hold that position under the management of the federal government with practically no change of duties. *Ibid.*

On Income.

Income received from the United States as salary by one, who, before the proclamation by the President of the United States on December 26, 1917, assuming control of all transportation systems, was a vice-president in charge of the operation of a railroad corporation and thereafter continued in charge of the operation with duties practically the same as before, is by St. 1916, c. 269, § 5 (b), exempted from taxation as income under the provisions of that statute. *Biscoe* v. *Tax Commissioner*, 201.

The exemption from taxation upon income under St. 1916, c. 269, § 12, provided by § 5 (b), for the "wages and salaries of employees and officers of the United States government," applies to income received from the United States as salary by one, who, before the federal government assumed control of the transportation system as above described, was employed as assistant counsel of a railroad corporation in Massachusetts and who thereafter continued to hold that position under the management by the federal government with practically no change of duties. *Ibid.*

Dane *v.* Treasurer & Receiver General, 234 Mass. 42, affirmed. *Dane* v. *Treasurer & Receiver General*, 280.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADE NAME.

Circumstances in which it was held that brothers, whose surname was Rubenstein and who were conducting business as a partnership called "Ruben-

stein Brotners," had no legal right to use the initials "R. B." in the name "R. B. Manufacturing Co." in competition with a corporation named "W. B. Manufacturing Company." *W. B. Manuf. Co.* v. *Rubenstein*, 215.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff was entitled to, was held to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *Ibid.*

Expert evidence to determine the cost of goods sold by the defendant in the unfair competition which was the subject of the suit above described was held to have been admissible where it appeared that the defendants did not furnish all the information within their control as to the cost of goods and profits made by them. *Ibid.*

The master in the suit above described was held properly to have ruled that losses sustained by the defendant in selling goods at less than cost should not be deducted from profits made in the sale of other goods. *Ibid.*

In the above described suit it was held that the defendant was not entitled as of right under the circumstances to prove sales made by him to customers which were his before he began the unfair competition, thereby to establish what he might have realized as profits if he had conducted his business without attempting to appropriate the benefit of the name of the plaintiff. *Ibid.*

TRADE UNION.

See LABOR AND LABOR UNION.

TRUST.

What constitutes.

Provisions in a will as to persons other than the testator's widow which it was held were to be interpreted as expressive of a desire and request which did not affect the absolute estate given to the widow. *Knibbs* v. *Knibbs*, 182.

Under the provisions of the will above described it was held that the persons other than the widow had no right under the will enforceable either at law or in equity. *Ibid.*

Construction of Instrument creating Trust.

Provisions in a trust created by will under which it was held that the interest in the trust property in remainder after the life interests vested at the death of the testator. *Trull* v. *Tarbell*, 68.

Provisions in a trust created by will under which it was held that in the events which happened the interest in the trust property in remainder after the life interests vested in those who were the testator's "heirs at law" at the time of his death, descended to the survivor of his children and was subject to the provisions of that child's will. *Ibid.*

TRUSTEE PROCESS.

Where a claim of a municipal officer to compensation for his services is based, not merely on a statutory provision but also upon an enforceable obliga-

tion of the corporation, although that obligation is one entered into under statutory authority or direction, such claim in legal effect is upon an express contract and an amount so due may be attached in an action by trustee process against the officer as defendant and the municipality as trustee. Walter *v.* Cook, 129 Mass. 577, distinguished. *Hooker* v. *McLennan*, 117.

A bill in equity under R. L. c. 159, § 3, cl. 7, as amended by Sts. 1902, c. 544, § 23; 1910, c. 531, § 2, cannot be maintained to reach and apply, in payment of a debt due to the plaintiff from the principal defendant, salary due to that defendant as first assistant assessor of taxes of the city of Boston, such salary being attachable by trustee process. *Ibid.*

UNFAIR COMPETITION.

Circumstances in which it was held that brothers, whose surname was Rubenstein, and who were conducting business as a partnership called "Rubenstein Brothers," had no legal right to use the initials "R. B." in the name "R. B. Manufacturing Company" in competition with a corporation named "W. B. Manufacturing Company." *W. B. Manuf. Co.* v. *Rubenstein*, 215.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff was entitled to, was held to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *Ibid.*

Expert evidence to determine the cost of goods sold by the defendant in the unfair competition which was the subject of the suit above described was held to have been admissible where it appeared that the defendants did not furnish all the information within their control as to the cost of goods and profits made by them. *Ibid.*

The master in the suit above described was held properly to have ruled that losses sustained by the defendant in selling goods at less than cost should not be deducted from profits made in the sale of other goods. *Ibid.*

In the above described suit it was held that the defendant was not entitled as of right under the circumstances to prove sales made by him to customers which were his before he began the unfair competition, thereby to establish what he might have realized as profits if he had conducted his business without attempting to appropriate the benefit of the name of the plaintiff. *Ibid.*

UNION.

See LABOR AND LABOR UNION.

UNLAWFUL INTERFERENCE.

Evidence which was held insufficient to enable the owner of a building to maintain against a lessee of a portion thereof, who, under a claim of right but wrongfully, is occupying a part of the basement under the premises leased to him, an action for malicious interference, through persistence in wrongful occupancy of the space in the basement, with the making by the owner of a contract of letting of another portion of the building to a third person who required the space for his use. *Goldsmith* v. *Traveler Shoe Co.* 111.

Where the trial of an action, founded upon contentions by the plaintiff that the defendant wrongfully occupied premises owned by the plaintiff knowing that by so doing he was preventing the plaintiff from making a lease of them, proceeded, by reason of statements by the plaintiff's counsel and statements by the trial judge assented to or treated with silence and without objection by the plaintiff's counsel, as upon a claim for damages resulting from a malicious interference with the contract of letting about to be executed, and a verdict was ordered for the defendant, it is not open to the plaintiff, upon an exception to the ordering of the verdict, to contend in this court that he was entitled to go to the jury on a claim for trespass. *Goldsmith* v. *Traveler Shoe Co.* 111.

The harmful circulation of libellous statements for the purpose of injuring the business of another is an unlawful interference with such other person's property rights for which the wrongdoer is answerable in an action of tort. *Godin* v. *Niebuhr*, 350.

Evidence upon which the handing out to passers-by in front of a barber shop by the business agent and secretary of a local barber's union of printed cards stating that the proprietor was "Unfair to Organized Labor. He refuses to employ Union Barbers or conduct a Union Barber Shop," may be found to be an unlawful and unjustifiable interference with the business of the proprietor of the shop for which an action of tort may be maintained. *Ibid.*

Evidence at the trial of an action brought under the circumstances above described upon which it was held that for the invasion of his rights the plaintiff was entitled to at least nominal damages. *Ibid.*

In the action above described it was held that there was evidence of specific damages. *Ibid.*

Evidence in the action above described upon which it was held that the jury might well have inferred that the intended and natural result of the defendant's wrongdoing was substantially to injure the plaintiff's business. *Ibid.*

A strike of workmen which is for the sole object of compelling the employer to re-employ a discharged fellow workman of the strikers is a strike for an unlawful purpose, and it will be enjoined in a suit in equity by the employer against the strikers, even if no illegal means are employed to carry it into effect. *Mechanics Foundry & Machine Co.* v. *Lynch*, 504.

USAGE.

See CUSTOM.

VARIANCE.

See that subtitle under PRACTICE, CRIMINAL.

VENUE.

No error was found by this court in the denial by a judge of the Superior Court of motions for a continuance and a change of venue of indictments charging the burning and the procuring of the burning of a dwelling house and the procuring of the burning of an insured building with intent to defraud the insurer, offered when the indictment was about to be tried in the

county of Suffolk on the ground that certain publications in certain daily newspapers in Boston were prejudicial to the defendants. *Commonwealth* v. *Leventhal*, 516.

VERDICT.

See PRACTICE, CIVIL.

WAGERING CONTRACTS.

Findings of an auditor in an action against a stockbroker for money alleged to have been paid in transactions of the character described in R. L. c. 99, § 4, which it was held established the defence, stated in the statute, that actual purchases and sales were made upon the order of the plaintiff, and which findings were not affected by certain further findings of the auditor. *Barrell* v. *Paine*, 157.

A finding of an auditor, to whom was referred an action under R. L. c. 99, § 4, for cash paid and securities delivered by the plaintiff to the defendant, a stockbroker, "that the plaintiff gave orders in a few cases to sell securities he did not at the time own, and that in numerous cases he made settlements without the completion of the purchase or sale of the securities ordered to be bought or sold" it was held was, under § 6 of the statute, at most *prima facie* evidence of the apparent intent required by the statute, and did not as a matter of law require a finding of such intent if on all the evidence a contrary finding was warranted. *Adams* v. *Hayden*, 454.

In the action above described which was heard upon the auditor's report and a stipulation as to certain evidence which was before the auditor it was held that in the circumstances and in the absence of a report of the entire evidence before the auditor, the auditor's conclusion of fact, that the plaintiff did not at any time intend that there should not be actual purchases or sales by the defendant, must stand because it was not as a matter of law inconsistent with other facts found by him. *Ibid.*

In the action above described it was held that the statute did not make the defendant liable merely upon his carrying on margin securities which he had purchased for his customer. *Ibid.*

Findings of an auditor and a stipulation as to certain evidence which was before the auditor upon which it was held in the above described action that the trial judge was warranted in finding for the defendant. *Ibid.*

WAIVER.

Where a salesman who was employed under a contract in writing for a year for a stipulated salary per week and further compensation at the end of the year and was discharged before the year expired brought an action against the employer upon an account annexed containing an item for salary for the week ending at the time of the termination of the employment, and a second and a third item, respectively, for salary for two weeks following the date of the writ, obtained a judgment except for the two weeks subsequent to his discharge and thereafter brought a second action, alleging a wrongful discharge and claiming entire damages for breach of the contract it was held that the plaintiff in neither action elected to treat the contract as terminated. *Dalton* v. *American Ammonia Co* 105.

The two actions above described were held not inconsistent. *Dalton* v. *American Ammonia Co.* 105.

The two items in the first action above described, wherein the plaintiff claimed salary for two weeks succeeding his alleged discharge, it was held did not constitute a decisive election inconsistent with the second action. *Ibid.*

By R. L. c. 42, § 29, the filing, by a teacher in a public school in a city with the auditor or treasurer of the city or with any officer who may be prescribed in its charter, of one copy of a certificate from the school committee of his qualifications is made a condition precedent to his right to demand and receive compensation for his services; and this requirement of the statute cannot be waived either by the mayor or by the city solicitor in an action by the teacher against the city for balance of salary which had been withheld upon an order of the mayor for a reason other than a failure to file the certificate. *Averell* v. *Newburyport*, 208.

A delay of two months and sixteen days after the filing, twenty days after the trial of an action, of a bill of exceptions, in filing a motion to dismiss the exceptions for failure to give the notice in writing required by Rules 52 and 28 of the Superior Court (1915) does not constitute as a matter of law a waiver of rights under those rules. *Day* v. *McClellan*, 330.

A provision in a policy of insurance against fire which it was held could not be overcome by invoking the aid of the doctrine of waiver and estoppel based on interviews of the assured with agents of the insurance company after he had received and had accepted the policy. *Cass* v. *Lord*, 430.

WANTON AND RECKLESS MISCONDUCT.

Evidence upon which it was held that in the absence of wilful, wanton and reckless misconduct of the defendant there can be no recovery under St. 1907, c. 375, for the death of a boy who while upon factory premises without invitation of the proprietor seized a wire running from an electric transformer located upon the premises to the factory and was killed by high voltage electricity either in an action against the proprietor of the factory or in an action against an electric company which owned, controlled and maintained the transformers and wires. *Robbins* v. *Athol Gas & Electric Co.* 387.

Evidence at the trial together of the actions above described, upon which it was held that, while in the light of the accident it seems that the apparatus might well have been enclosed or otherwise guarded, the evidence did not warrant a finding that either defendant had been guilty of wilful, wanton or reckless misconduct which had caused the boy's death. *Ibid.*

WAREHOUSEMAN

At the trial of an action of tort for conversion against a deputy sheriff, who had attached, in an action against a third person, onions of which the plaintiff claimed ownership and which, when attached, were stored in a warehouse, testimony by the warehouseman is admissible, independently of entries in his books, if he kept any, that the plaintiff had made the arrangements with him for the storage of the onions. *Koski* v. *Haskins*, 346.

WATER RIGHTS.

Provisions in an agreement in the form of an indenture, executed and delivered in 1849, between the owner of land bounded on the thread of a stream, across which there was a dam built upon his land and upon the adjacent land on the other side of the thread of the stream belonging to a third person, upon which, in a petition for the assessment of damages resulting from a taking under statutory authority of the land and dam by a city for the purposes of its water supply it was held that the contract was not in violation of the rule against restraints on alienation or the rule against perpetuities. *Battelle* v. *Worcester*, 395.

In the above described proceedings it was held that the agreement was not a personal contract between the parties. *Ibid.*

In the above described proceedings it was held that the rights of the petitioner had not been lost by laches, but still were vested in him at the time of the taking. *Ibid.*

In the above described proceedings it was held that there was incident to the land of the petitioner which was taken a right or interest under the contract which ought to be considered in estimating the fair market value of the land taken. *Ibid.*

In the above described case it was held that the covenant relating to the release of the right to maintain the dam upon a payment of $800 by the owner of the land related only to that part of the dam built upon the petitioner's land and not to the part built upon land on the other side of the thread of the stream. *Ibid.*

It also was held in the above described case that damages assessed in connection with the contract should be limited to the value of the petitioner's right, which related to a release only to that part of the dam which rested upon the petitioner's land. *Ibid.*

A suit in equity cannot be maintained to enjoin a city from draining water by a twelve inch pipe from a public way and through an artificial open ditch across land of a third person and land of the plaintiff to a six inch pipe under a private way which discharged beyond the plaintiff's land, although the result of such method of draining is to cause water to overflow upon the plaintiff's land, where the ditch was dug many years after the twelve inch pipe was laid and it does not appear that the city caused it to be dug or the six inch pipe to be laid or ever maintained or recognized either as a means of drainage or otherwise. *Blair* v. *Brockton*, 512.

WAY.

Private.

Upon exceptions, by certain respondents in a petition in the Land Court for the registration of the title to a certain parcel of land on Eastern Point in Gloucester, to rulings that the respondents were not entitled to a right of way over the petitioner's land, it was held that there was no necessity for considering what rights of way, if any, owners of land on the Point, other than the excepting respondents, might have, except so far as the existence

of such rights might be pertinent to the exceptions. *Prentiss* v. *Gloucester*, 36.

Evidence at the trial of the above described petition, where it appeared that two ways, Eastern Point Boulevard (East) and Eastern Point Boulevard (West), were continuous and there was no well defined point of demarcation at the south, upon which it was held that the refusal of a request for a ruling, "For the purpose of determining the extent of rights of way impliedly granted to the purchasers of lands on Eastern Point, Eastern Point Boulevard (East) and Eastern Point Boulevard (West) are to be treated as a single road" was warranted. *Ibid.*

Where a large tract of land is plotted into numerous lots bounded on many different ways, and deeds of the several lots contain no express grant of rights in the ways shown on the plan, a grant by implication of an onerous servitude in the nature of rights in the ways will not be presumed where such rights are not necessary for the enjoyment of the land conveyed, unless such grant clearly is shown to be intended by the parties to the deed. *Ibid.*

A reference in a deed to a plan showing ways as above described, although accompanied by its use for description of bounds, will not convey to the grantee rights in the ways not necessary for the enjoyment of the premises where no intent to make such a grant appears in the deed. *Ibid.*

The necessity, in contemplation in ordinary cases, for the use of ways such as those above described, is that of access to public ways. *Ibid.*

The great desirability of a way for purposes of prospect does not make the use of a way, such as is above described, necessary to the granted premises. *Ibid.*

No grant by implication of a right of way over Eastern Point Boulevard (East), above described, arose from deeds of lots on Eastern Point Boulevard (West) and in the northeastern portion of the Point, Eastern Point Boulevard (East) not being mentioned in the deeds nor shown on plans accompanying them and its use not being necessary for access from the granted premises to a public way. *Ibid.*

Where a deed of land contains a provision specifically defining rights of way which are appurtenant to the land conveyed no easement in other ways on land of the grantor can be created by implication. *Ibid.*

A provision in a deed granting a right of way over Boylston Place in Boston which, upon a petition by the owners of Boylston Place for an amendment of a certificate of registration of title, it was held expressly and intentionally limited the right of way to the occupants of certain dwelling houses to be erected. *Nash* v. *Eliot Street Garage Co.* 176.

Upon the petition above described it was held that the dwelling houses having been destroyed, the right of way was extinguished. *Ibid.*

Upon the same petition it also was held that the provision above referred to could not reasonably be construed as a temporary provision in regard to fencing lots which for a short period might be vacant before the houses were built. *Ibid.*

Provisions in a deed in evidence at the hearing of a petition for the registration of the title to a parcel of land, where it appeared that the respondent owned land adjoining that of the petitioner, and that the petitioner claimed a right of way over the respondent's land upon which it was held that the petitioner had no right of way over the land of the respondent. *McDonough* v. *Neighborhood Club of Swampscott, Inc.* 238.

Way (*continued*).

Public.

Evidence at the trial of two actions of tort under R. L. c. 51, § 17, by an administrator respectively against a street railway company and the county of Essex, for causing the death of the plaintiff's intestate at a draw in Plum Island bridge, upon which it was held that there was no evidence that the bridge was defective. *Braley* v. *Massachusetts Northeastern Street Railway*, 275.

The Commonwealth is not liable for injuries caused by a vehicle colliding in the night time with an iron horse, which was left unlighted after it had been placed as a barrier across the half of a much travelled State highway which was being repaired and upon which the vehicle rightfully was travelling. *Lemon* v. *Commonwealth*, 599.

Negligent use of.

See NEGLIGENCE, *In Use of Way*.

WILL.

Attestation.

Where at the hearing of a motion for a new trial of issues for a jury framed on an appeal from a decree of the Probate Court allowing a will the appellant for the first time requested a ruling that it was necessary to call all the attesting witnesses who were accessible it was held that the ruling properly was refused. *McLehose* v. *Reid*, 487.

Construction.

See DEVISE AND LEGACY.

WITNESS.

Subscribing Witness to Will.

Where at the hearing of a motion for a new trial of issues for a jury framed on an appeal from a decree of the Probate Court allowing a will the appellant for the first time requested a ruling that it was necessary to call all the attesting witnesses who were accessible it was held that the ruling properly was refused. *McLehose* v. *Reid*, 487.

Credibility.

Evidence at the trial of an action against the receiver of a street railway company for causing personal injuries and death of an employee of the driver of a motor truck tending to show that the witnesses were intoxicated when the accident happened which it was held should have been admitted, as it affected the credibility of the witnesses and the weight to be given to their testimony. *Labrecque* v. *Donham*, 10.

Expert.

A master, to whom a suit in equity, to restrain the defendant from unlawful interference with the plaintiff's business by the use of a similar trade name, was referred to find and report what profits and damages, if any, the plaintiff

was entitled to, was held to have discretionary power to determine the qualifications of a witness offered as an expert upon matters in issue. *W. B. Manuf. Co.* v. *Rubenstein*, 215.

Contradiction.

Evidence offered to controvert the testimony of a fellow employee at the trial of an action against the receiver of a street railway company for causing personal injuries and the death of an employee of the driver of a motor truck who, when the truck became stalled upon a street car track, ran forward and attempted to crank it with his back turned toward an approaching street car and was struck by the car which it was held rightly was excluded, since it had no tendency to controvert anything previously testified to by the fellow employee. *Labrecque* v. *Donham*, 10.

Where a witness in direct examination has answered questions relating to a relevant matter by stating merely that he did not remember, the party calling him cannot introduce, for the purpose of contradicting the witness, evidence of statements previously made by the witness on the subject matter under inquiry. *Bilodeau* v. *Fitchburg & Leominster Street Railway*, 526.

Accomplice in Crime.

At the trial of an indictment charging several persons with a crime, where two of them, one after pleading guilty and the other after an entry of *nolle prosequi* had been made as to him, testified for the Commonwealth and against their co-defendants, the first acknowledging participation in the crime and the second admitting knowledge that it was being contemplated, it was for the jury to determine what weight should be given to such testimony and whether, upon it alone, the remaining defendants should be convicted. *Commonwealth* v. *Leventhal*, 516.

Instructions given to the jury as to the testimony of the first of the two government witnesses above described, in which there was no error. *Ibid.*

WORDS.

"Anniversary of issue." See *Coleman* v. *New England Mutual Life Ins. Co.* 552, 554–556.

"Appropriate legislation." See *Commonwealth* v. *Nickerson*, 281, 291, 306.

"Approved." See *Simpson* v. *Marlborough*, 210, 214.

"Beverage." See *Commonwealth* v. *Sookey*, 448, 451.

"Concurrent." See *Commonwealth* v. *Nickerson*, 281, 288–290, 295.

"Concurrent power." See *Commonwealth* v. *Nickerson*, 281, 287, 295.

"Dependents." See *Gritta's Case*, 204, 206.

"Fair proportion." See *Wellington Piano Case Co.* v. *Garfield & Proctor Coal Co.* 544, 549

"Family." See *Gritta's Case*, 204, 206.

"Heirs at law." See *Trull* v. *Tarbell*, 68, 74.

"Him." See *Kennon* v. *Shepard*, 57, 59.

"Intoxicating liquor." See *Commonwealth* v. *Nickerson*, 281, 286, 303, 304, 308. *Commonwealth* v. *Sookey*, 448, 450.

"Lived together." See *Field* v. *Field*, 256, 257.

"Prosecutions." See *Eastman Marble Co.* v. *Vermont Marble Co.* 138, 151.
"Vacation periods." See *Duffey* v. *School Committee of Hopkinton*, 5, 7, 8.

WORKMEN'S COMPENSATION ACT.

Employee's Claim of Common Law Rights.

Evidence in an action against the proprietor of a store for personal injuries by a woman who was employed as a buyer of millinery under a general contract in writing for a year at a stipulated weekly salary by the proprietor of the store upon which it was held that the injury to the woman arose out of and in the course of her employment and that she was not entitled to maintain an action at common law against the proprietor of the store. *White* v. *E. T. Slattery Co.* 28.

In General.

Although participation in the provisions as to compensation in the workmen's compensation act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the General Court with relation to past events. *Devine's Case*, 588.

The committee on arbitration, constituted by § 6 of Part III of the workmen's compensation act, was a purely administrative tribunal and constituted no part of the substantive rights conferred by the act upon any of its beneficiaries. *Ibid.*

Procedure.

Hearing by single member of board.

The amendment of the workmen's compensation act contained in St. 1917, c. 297, abolishing the committee on arbitration and providing in substance that, where parties failed to agree, the Industrial Accident Board might assign the case for hearing by a member of the board, was an amendment relating solely to procedure and not affecting any substantial right of employer, employee or insurer. *Devine's Case*, 588.

No constitutional right of a widow of an employee claiming compensation under the workmen's compensation act by reason of his death, which she alleged resulted on October 18, 1917, from injuries received on May 14, 1917, was impaired by the enactment on May 24, 1917, of St. 1917, c. 297, described above, nor by her claim being referred thereunder for hearing by a single member of the Industrial Accident Board instead of by a committee on arbitration appointed under § 6 of Part III of the act as amended by St. 1912, c. 571, § 11, which was in force at the time the alleged injury occurred. *Ibid.*

Rehearing.

Under § 10 of Part III of the workmen's compensation act, as amended by Sts. 1912, c. 571, § 13; 1917, c. 297, § 6, the granting of a motion for a rehearing of a claim upon any question of fact is a matter of discretion. *Devine's Case*. 588.

Evidence.

At a hearing by the Industrial Accident Board of the question, whether injuries received by an employee, who was a claimant in proceedings under the workmen's compensation act, were caused by the serious and wilful misconduct of the employer so that the claim came under the provisions of St. 1911, c. 751, Part II, § 3, the board can take judicial notice of general safety rules and regulations and machinery standards established by the State board of labor and industries under St. 1913, c. 813, as amended by St. 1916, c. 308. *Sciola's Case*, 407.

A failure by an employer to install a safety device upon a machine as required by the general safety rules and regulations and machinery standards of the State board of labor and industries, adopted under the authority of St. 1913, c. 813, if it results in injury to an employee, does not as a matter of law constitute "the serious and wilful misconduct" on the employer's part referred to in St. 1911, c. 751, Part II, § 3. *Ibid.*

Appeal.

Upon an appeal from a decree of the Superior Court dismissing a claim for compensation under the workmen's compensation act following a denial, both by the Superior Court and by the Industrial Accident Board, of a motion by the claimant, supported by affidavits as to additional evidence, for a general rehearing of the case, it was held that the record failed to show that there had been any abuse of discretion in the denial of the motion, and that it could not be said that the discretion was not wisely exercised. *Devine's Case*, 588.

Appeal to Superior Court.

Under St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, while it is a condition precedent to the jurisdiction of the Superior Court to enter a decree upon a decision of the Industrial Accident Board that copies of the order or decision of that board shall have been filed in the Superior Court and that such copies shall be certified, such copies need not be filed within ten days after the decision of the board unless it is desired to appeal from the decree of the Superior Court to be entered thereon. *Sciola's Case*, 407.

The Superior Court has no jurisdiction to enter a decree in such a proceeding if the copies of the proceedings filed with it are not certified. *Ibid.*

While, ordinarily, the remanding by the Superior Court of a claim under the workmen's compensation act to the Industrial Accident Board for further hearing is within the discretionary power of the court, a decree so remanding a case may be reviewed and should be reversed if its sole purpose is to direct the board's attention to matters of fact which the board already has fully considered or to require a reconsideration of rulings of law which were correct. *Ibid.*

The insurer in proceedings under the workmen's compensation act has a right to appeal from an interlocutory decree of the Superior Court remanding the claim to the Industrial Accident Board for further hearing upon certain evidence specified in the decree, where it appears that the certified copies, required by St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, as a basis for a decree of the Superior Court, were filed in the Superior Court more than ten days after notice of the de-

cision of the Industrial Accident Board, and that consequently there could be no appeal from a final decree to be entered in the matter by the Superior Court. *Sciola's Case*, 407.

Appeal to Supreme Judicial Court.

Under St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, while it is a condition precedent to the jurisdiction of the Superior Court to enter a decree upon a decision of the Industrial Accident Board that copies of the order or decision of that board shall have been filed in the Superior Court and that such copies shall be certified, such copies need not be filed within ten days after the decision of the board unless it is desired to appeal from the decree of the Superior Court to be entered thereon. *Sciola's Case*, 407.

While, ordinarily, the remanding by the Superior Court of a claim under the workmen's compensation act to the Industrial Accident Board for further hearing is within the discretionary power of the court, a decree so remanding a case may be reviewed and should be reversed if its sole purpose is to direct the board's attention to matters of fact which the board already has fully considered or to require a reconsideration of rulings of law which were correct. *Ibid.*

The insurer in proceedings under the workmen's compensation act has a right to appeal from an interlocutory decree of the Superior Court remanding the claim to the Industrial Accident Board for further hearing upon certain evidence specified in the decree, where it appears that the certified copies, required by St. 1911, c. 751, Part III, § 11, as amended by Sts. 1912, c. 571, § 14; 1917, c. 297, § 7, as a basis for a decree of the Superior Court, were filed in the Superior Court more than ten days after notice of the decision of the Industrial Accident Board, and that consequently there could be no appeal from a final decree to be entered in the matter by the Superior Court. *Ibid.*

To whom Act applies.

The provisions of the workmen's compensation act are not operative in favor of a dependent of an employee of a subscriber under the act who lost his life from causes arising out of and in the course of his employment as mate upon a steam lighter used by the employer in coastwise traffic for the transportation of sand and gravel between Scituate and Boston and while the vessel was within three miles of shore. *Dorman's Case*, 583.

Injuries to which Act applies.

Evidence upon which it was held that injuries received by an employee in the dyeing room of a textile factory, whose duty was the operation of two machines known as "jigs," and who went upon the roof to remedy a defect in certain ventilators and was injured by a fall while so doing, must be held not to have arisen out of or in the course of his employment. *Kozu's Case*, 342.

Evidence upon a claim for compensation under the workmen s compensation act by the dependent mother of one who met his death while employed as a "bus boy" in a restaurant by falling down the shaft of an elevator which it was no part of his work to operate and which he had been instructed not

to use and not to go near upon which it was held that all the facts and circumstances shown and every reasonable inference therefrom left conjectural what the employee was doing when he fell into the well and what was the exact cause of his death; and that the claimant therefore had not established her claim. *McMahon's Case*, 473.

Where, upon a claim by the widow of an employee under the workmen's compensation act, it appears that, while engaged in his employer's regular work, the employee was thrown violently from the seat of a wagon to the hub of a wheel and then to the curbstone, that, at the time when he received the injuries, he was suffering from pulmonary tuberculosis and that the injury, while not causing that disease, hastened its progress or excited it to a fatal termination, a finding is warranted that the employee's death was caused by injuries received in the course of and arising out of his employment. *Glennon's Case*, 542.

In a claim under the workmen's compensation act by a widow of an employee whose death on an October 18 was alleged to have been caused by injuries received by him on the preceding May 14, a finding by a single member of the Industrial Accident Board and by the board, that the employee's death "was not due to or related to a personal injury which arose out of and in the course of his employment," is not contrary to nor necessarily inconsistent with an agreement by the parties at the hearing, that the employee "received a personal injury arising out of and in the course of his employment on May 14" and that he was paid compensation at the rate of $6 per week up to September 16. *Devine's Case*, 588.

Employer.

Evidence in proceedings under the workmen's compensation act to recover compensation for injuries sustained by a teamster while unloading wool at a warehouse of a firm to which he had been directed to deliver wool by a firm other than his general employer upon which it was held that in the absence of evidence showing control of the teamster by the second firm, it was presumed that authority over him remained in the general employer. *Hogan's Case*, 241.

In the above described proceedings it was held that a finding was warranted that the teamster when injured was in the employ of his general employer. *Ibid.*

In the above described proceedings it also was held that a decree directing that compensation be paid by the insurer of the general employer was warranted. *Ibid.*

Dependency.

Evidence in a proceeding under the workmen's compensation act upon which it was held that illegitimate children living with their mother and putative father at the time of his death were members of his family and entitled to compensation. *Gritta's Case*, 204.

WRIT OF ERROR.

Where, by a writ of error a judgment of the Superior Court is taken to the Supreme Court of the United States and the writ there is dismissed for

want of jurisdiction, the Superior Court has no further power over the judgment, which remained in full force and effect, and has no power to grant a motion by the defendant that the judgment be "set aside," or a motion by the plaintiff that it be affirmed, or to order a judgment following the mandate. *Duart* v. *Simmons*, 225.

WRIT OF HABEAS CORPUS.

A petitioner for a writ of habeas corpus has no right to a trial by jury of facts placed in issue by the pleadings. *Graves's Case*, 493.

Formal objections to an indictment found and returned by a grand jury of the State of Illinois are not grounds for the issuance of a writ of habeas corpus upon a petition filed in this Commonwealth by the defendant named in that indictment after his arrest under the authority of a warrant of the Governor of this Commonwealth issued upon a demand by the Governor of the State of Illinois for his extradition. *Ibid.*

A writ of habeas corpus was denied a petitioner seeking release from arrest under certain extradition proceedings. *Ibid.*

STATUTES CITED AND EXPOUNDED.

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